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The Calcutta Law Journal Reports.

APPELLATE CIVIL.

Before Mr. Justice Brett and Mr. Justice Mookerjee.

BHAWANI KOER

v.

MATHURA PRASAD AND OTHERS.

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May, 16, 17,
June, 20.

Revenue Sale Law (Act XI of 1859), Secs. 13, 14, 53, 54—Sale of a share of an estate, effect of—Encumbrance—Mortgage, previous—Purchaser at the revenue sale, rights of—Difference between language and scope of section 53 and 54 of the Sale-law—Title of auction purchaser, when accrues—Mortgagor, purchase by, if and when extinguishes his mortgage—Mortgagee purchaser, rights of, to fall back upon mortgage—Mortgage, if and when kept alive—Equity—Lis Pendens, doctrine of, when applies—Civil Procedure Code (Act XIV of 1852), Sec. 312—Sale in execution—Confirmation—Title, when it accrues—Purchaser.

A purchaser under section 13 of the Revenue Sale Law (Act XI of 1859) does not acquire merely the right, title and interest of the defaulting proprietor, but he takes the share itself which is exposed for sale, subject to the limitations prescribed in the section.

The words "shall not acquire any rights" in section 54 of the Act refer to the acquisition of rights in respect of interest, such as encumbrances, or the like, which are referred to in the previous phrase of that section.

Debi Das Chowdhury v. Biprocharan (1), Annoda Prasad Ghose v. Rajendra Kumar Ghose (2) and Gangadeen Misser v. Kheroo Mandul (3) referred to.

If a person acquires the interest of the original owner of the estate before the default is made, his interest cannot be said to be an encumbrance, and passes by the sale to the purchaser, because what is sold is in essence his share in the estate.

The words, "purchaser shall not acquire any rights which were not possessed by the previous owner or owners" in section 54 of the Act, do not mean that the purchaser at the revenue sale shall only acquire the rights possessed by the previous owner or owners at the date of the sale, but that the purchaser shall not acquire any rights not possessed by the previous owner or owners at sometime or another, and shall acquire no more than what was the property of the previous owner or owners.

* Appeal from Original Decree No. 132 of 1905 against a decree of Babu Annada Prasad Bagchi, Subordinate Judge of Gya, dated the 27th January 1906.

(1) (1895) 11 L. R. 22 Cal. 641.

(2) (1901) 1. L. R. 29 Cal. 223.

(3) (1874) 14 B. L. R. 170 ; 22 W. R. 449.

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The purchaser at a sale for arrears of revenue of a share of an estate under section 13 does not take the property subject to encumbrances created after the date of the default and before the date of the revenue sale.

Jogeesur Mullick v. Khetter Mohun Pal (1), and *Umatara Gupta v. Uma Charan Sen* (2) referred to.

A purchaser of the interest of the proprietor after default and before revenue sale, is quite as much bound by the revenue sale as the proprietor himself, because in substance, he occupies the position of the proprietor.

Although the purchaser does not take subject to any encumbrances created after the default, he takes subject to such encumbrances only as have been created before default and are in actual existence, because undischarged, or though discharged on the date of the revenue sale, may, upon equitable principles, be allowed to be set up.

Sham Kumari v. Rameswar Singh (3) distinguished and explained.

The language and scope of section 53 are materially different from those of section 54 of the Act; under the one section, the purchaser takes subject to all encumbrances existing at the time of sale, while under the other, no encumbrance created after default is binding on the purchaser.

Although an auction purchaser does not acquire a full title till the confirmation of the sale, yet upon general principles, he may have equitable rights, arising out of his purchase, before the date of confirmation of the sale.

Dagdu v. Pancharam Sing (4), *Chiddo v. Peary Lal* (5), *Het Ram v. Baldeo* (6) *Yeshvant v. Govind* (7), *Adhur Chunder v. Aghore Nath* (8), *Bokaria Rudrani v. Ram Pertap* (9), *Robertson v. Vancleave* (10), *Yeazel v. Einspahr* (11) and *Morse v. Hackensack* (12) referred to.

Scope of section 316 of the Civil Procedure Code examined.

Although the title to the property sold vests in the purchaser from the date of the confirmation, he does not acquire the right, title and interest of the judgment-debtor as they stand on that date. If he has purchased in execution of a money decree, he takes the property as it stood on the date of attachment and is not affected by any subsequent dealings therewith on the part of the judgment-debtor. If he has purchased in execution of a decree on a mortgage, he takes the property as it stood on the date of the creation of the mortgage and persons who have subsequently become interested in different fragments of the equity of redemption cannot claim a superior title.

The mere fact that a judgment has been obtained on a mortgage does not extinguish the debt, and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Statute of Limitations.

Drake v. Mitchell (13) and *Surjiram Marwari v. Barhamdeo Pershad* (14) referred to.

Although a security is extinguished upon the actual sale of the mortgaged properties and distribution of the proceeds, yet, a mortgagee, who has purchased

(1) (1889) I. L. R. 17 Calc. 148.

(2) (1904) 3 C. L. J. 52.

(3) (1904) L. R. 31 I. A. 176; I. L. R. 32 Calc. 27.

(4) (1892) I. L. R. 17 Bom. 375.

(9) (1906) 11 C. W. N. 158.

(5) (1896) I. L. R. 19 All. 188.

(10) (1891) 15 L. R. A. 68.

(6) (1894) 14 All. W. N. 54.

(11) (1894) 24 L. R. A. 449.

(7) (1886) I. L. R. 10 Bom. 453.

(12) (1891) 12 L. R. A. 62.

(8) (1898) 2 C. W. N. 589.

(13) (1803) 3. East. 251; 7. R. B. 449.

(14) (1905) 2. C. L. J. 202 (214).

at a sale in execution of a decree upon his mortgage, is entitled to rely upon his mortgage as a shield against a subsequent encumbrancer.

Debendra Narain Roy v. Ramtaran (1) referred to.

Bibijan Bibi v. Sachi Bewa (2) explained.

The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. Although ordinarily, when the interests of the mortgagor and the mortgagee are united in the same person, it is not necessary for him to keep them distinct, equity will keep them distinct, when from the intention of the party, either express, or implied, it is for his benefit that they should be so kept; it depends upon the intention, actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage.

Where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption.

A mortgage, however, will not be kept alive in aid of a fraud or wrong; a mortgage substantially satisfied may be kept alive in equity only when this is requisite to the advancement of justice, and this will never be allowed when the result will be, from the forms of law, to aid in perpetrating a fraud or an injury.

Gokuldass v. Rambux (3), *Mahesh Lal v. Baman Das* (4), *Dinobundhu v. Jogmaya* (5), *Throne v. Canu* (6), *Liquidation Estates Purchase Company v. Willoughby* (7), and *Hayden v. Kirkpatrick* (8) referred to.

A purchaser of a share of an estate under section 13 of Act XI of 1859 may be affected by the doctrine of *lis pendens*, if he makes his purchase during the pendency of a litigation to enforce a mortgage upon that property.

Har Shankar Prasad v. Shew Gobind (9) referred to.

In the case of a mortgage suit, the *lis pendens* continues after the decree nisi, and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale.

Surjiram Marwari v. Barhamdeo Pershad (10) referred to.

But where, as in the present case, the purchase at the revenue sale was effected sometime after the mortgage sale had been confirmed, there was no *lis pendens* on the mortgage pending at the date of the revenue sale.

Appeal by the Plaintiff.

Suit for possession of a share in four villages which the plaintiff purchased at a sale for arrears of revenue under section 18 of the Revenue Sale Law, but which was also purchased by the defendant at a sale in execution of a mortgage decree.

(1) (1903) I. L. R. 30 Calc. 599.

(2) (1904) I. L. R. 31 Calc. 863.

(3) (1884) L. R. 11 I. A. 126; I. L. R. 10 Calc. 1035.

(4) (1883) L. R. 10. I. A. 62; I. L. R. 9 Calc. 961.

(5) (1901) L. R. 29. I. A. 9; I. L. R. 29 Calc. 154.

(6) (1895) A. C. 11.

(8) (1865) 34 Beav. 645.

(7) (1898) A. C. 321.

(9) (1899) I. L. R. 26 Calc. 966.

(10) (1905) 2 C. L. J. 288.

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The facts of the case appear fully from the judgments.

Dr. Rash Behary Ghose and *Babus Umakali Mukherjee* and *Kulwant Sahay* for the Appellant.

Babus Lal Mohan Doss and *Atul Chandra Dutt* for the Respondents,

C. A. V.

The following judgments were delivered.

Brett J.—In Taluk Azamgarh, Purgannah Shaharghati, District Gaya, Touzi No. 4411, several separate accounts have been opened by different co-sharers and a residue share has been left consisting of 5 annas $1\frac{1}{2}$ pies in 71 villages. This residue or Ijmali share belonged to Mahammed Buksh and others, and they on the 9th August 1886 executed a mortgage bond in favour of defendant No. 1, Mathura Pershad Singh, by which they hypothecated the 5 annas $1\frac{1}{2}$ pies share in 4 out of the 71 villages as security for the mortgage debt. Mathura Pershad Singh instituted a suit on his mortgage bond on the 12th September 1898 and obtained a decree on the 31st May 1899. On the 19th March 1900, he, with the leave of the Court, purchased the mortgaged property in execution of the decree, and on the 23rd April 1900 obtained a sale certificate. Possession of the property was delivered on the 12th July 1900, and on the 18th December Mathura Pershad got his name registered as proprietor of the 5 annas $1\frac{1}{2}$ pies share of the 4 villages.

On the 29th March 1900, the *ijmali* or residue share fell into arrears for the March kist of Government revenue, the amount of arrears being Rs. 1,554-3. On the 4th May 1900, a notification of sale was issued by the Collector. On the 6th June 1900, the whole of the *ijmali* share was sold and was purchased in the name of defendant No. 2 by defendant No. 3, the husband of the plaintiff.

The defaulters appealed to the Commissioner but their appeal was dismissed on the 7th February 1901. Defendant No. 2 obtained a sale certificate on the 3rd April 1901, and possession was delivered to him on the 5th July 1901. On the 15th July 1901, defendant No. 2, the nominal purchaser executed a deed of release in favour of defendant No. 3, who afterwards applied for registration of his name in respect of the whole of the *ijmali* share and his application was granted on the 21st December 1901.

Defendant No. 1, however, appealed to the Collector against this order and on the 21st January 1902, the order for registration of the name of defendant No. 3 was set aside. Defendant No. 3

appealed to the Commissioner but his appeal was dismissed on the 31st May 1902.

Defendant No. 3 executed a deed of gift of the property in favour of his wife, the plaintiff on the 20th September 1902.

The plaintiff instituted the present suit on the 31st March 1904 to obtain possession from defendant No. 1 of the 5 annas 1 pie 10 krant share in the four mouzahs, which that defendant had purchased in execution of his mortgage decree and in respect of which he had been registered as proprietor in the Collectorate, and the application of the plaintiff for registration had been refused. The grounds on which the claim is based are that as the defendant No. 1 had purchased the property in dispute on the 19th March 1900, prior to the date when the whole *ijmali* share, in which it was included, fell into arrears for Government revenue and the sale and defendant's purchase were confirmed and a certificate of sale issued on the 23rd April 1900, that is to say before the whole *ijmali* share was sold for arrears of revenue on the 6th June 1900, therefore, all rights which the defendant acquired by his purchase were lost at the sale for arrears of revenue and further that, if he had wanted to stay the revenue sale, he ought to have paid in the amount of arrears of revenue for which the property was sold, before the last date for payment of the kist, as his purchase in execution of the decree on his mortgage took place before that date. In addition to the claim for possession, the plaintiff prayed for a direction to the Collector to register her name as proprietor of the property in suit in place of defendant No. 1 and to recover from him mesne profits up to the date of delivery of possession.

On behalf of defendant No. 1 it was pleaded that the rights which the plaintiff acquired by the purchase at the revenue sale were governed by the provisions of section 54 of Act XI of 1859, that the *ijmali* share was sold subject to all encumbrances and charges existing on the 28th March 1900, the date of default, and that on that date, the properties in suit were subject to an encumbrance or debt of Rs. 18,973-6-3 due on the mortgage to the defendant. The property in suit was purchased by the defendant at the sale for Rs. 9,200, leaving Rs. 9,773-6-3 still due on the decree, and so long as the plaintiff does not redeem the mortgage by paying up the whole sum due under the decree, he has no right to claim possession of the properties in dispute.

It was also pleaded that as the proceedings which terminated in the sale for arrears of revenue were taken during the pendency

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of the execution case of defendant No. 1, the doctrine of *lis pendens* would apply and the purchase of plaintiff, so far as the properties in suit are concerned, is wholly void and ineffectual against defendant No. 1. It was further alleged that at the time of the default in payment of the revenue kist, defendant No. 1 had not a complete title to the properties in dispute, that he was not aware that the whole *ijmali* share was in arrears, and that even if he had been aware of the fact, he could not have paid in the arrears.

On these pleadings, the Subordinate Judge framed 7 issues of which issues Nos. 2, 3, 4 and 5 are of importance for the purpose of this appeal.

Issue 3, which the Subordinate Judge has disposed of first, runs as follows :—

Was the defendant No. 1 bound to pay the Government revenue for the March kist 1900, and was defendant No. 1 aware of the property being in arrear ?

The Subordinate Judge held that though defendant No. 1 purchased the properties in suit on the 19th March 1900, his title was not perfected till the 23rd April 1900, when the sale was confirmed, and, therefore, that the mortgagors and not defendant No. 1 were bound to pay the Government revenue. The Government revenue on the whole *ijmali* share was Rs. 4,000, and the arrears for which the estate was sold were Rs. 1,552-0-4. The revenue due on the share in 4 villages which defendant No. 1 purchased was only Rs. 79. The Subordinate Judge was of opinion that defendant No. 1, even if he was aware of the default, could not be expected to pay the whole of it. This issue he, therefore, decided in favour of defendant No. 1.

Issues 2 and 4 which were disposed of together run as follows :

(2) Whether the revenue sale of the *ijmali* share of taluq Azumgarh has extinguished all the rights of defendant No. 1 under the mortgage decree and under the auction purchase in execution of that decree ?

(4) What encumbrance, if any, defendant No. 1 had in the disputed property, and whether the plaintiff is entitled to recover possession of the disputed property without paying with interest the amount of encumbrance due to the defendant No. 1 from Mahammad Baksh Khan (the mortgagor) ?

The Subordinate Judge held that at the sale for arrears of revenue, what was sold was the right, title and interest of the defaulters, as it existed at the time of the default or of the sale;

that on the date of the revenue sale, the 6th June 1900, the defaulters had no right in the shares in the 4 mouzahs which had been purchased by defendant No. 1 in execution of his mortgage decree, and, therefore, that the revenue sale of the *ijmali* share did not extinguish the right of defendant No. 1 under the auction purchase in execution of the mortgage decree.

The Subordinate Judge, therefore, found both these points in favor of defendant No. 1.

The 5th issue, which was, whether the doctrine of *lis pendens* applies to the purchase of defendant No. 3, was not dealt with by the Subordinate Judge. His findings on the 1st issue which dealt with the title of the plaintiff are somewhat obscure. These are not however of importance for the purpose of this appeal, as the title of the plaintiff by gift from defendant No. 3 has not been seriously disputed.

The Subordinate Judge in the end dismissed the suit with costs, and the plaintiff has appealed.

In attacking the finding of the Subordinate Judge on the issues set out above, three main contentions have been advanced on behalf of the appellants.

1. That the decree on the mortgage having been made absolute before the arrears of revenue fell due, there was no encumbrance in existence on the 29th March 1900, when the *ijmali* share was found to be in default.

2. Assuming that section 316, Civil Procedure Code, governs sales under the Transfer of Property Act, the title to the shares in the 4 villages sold in execution of the mortgage decree became vested in the mortgagee (defendant No. 1) on the 19th March 1900, when the property was sold to him and not on the 23rd April 1900, when the sale was confirmed, and (3) that defendant No. 1 had ceased to be a mortgagee and had become an owner of the property at the time of the revenue sale on the 6th June 1900, and, therefore, that under that sale, all his rights passed to the purchaser.

The *ijmali* share was sold for arrears of revenue under the provisions of section 13 of Act XI of 1859, and the purchaser at that sale acquired (under section 54 of the same Act) the share subject to all encumbrances and did not acquire any rights which were not possessed by the previous owner or owners. I am unable to accept the view which the Subordinate Judge has taken, that what was sold at the revenue sale, was the right, title and interest only of the defaulters. Such a view is contrary to the whole policy of the Revenue Law and is opposed to the decisions of

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this Court in this cases of *Gungadeen Misser v. Kheeroo Mundul* (1), *Debi Das Chaudhuri v. Bipro Charan Ghosal* (2), and *Annoda Prosad Ghose v. Rajendra Kumar Ghose* (3); clearly what was sold was the share subject to encumbrances.

The main question for determination then in this case is whether the mortgage by the defaulters to defendant No. 1 was an encumbrance, subject to which the share was sold, or had it ceased to exist as an encumbrance by reason of the purchase by defendant No. 1 of the mortgaged properties on the 19th March 1900, prior to the date of default, which purchase was confirmed on the 23rd April following.

The case put forward for the respondents has been that the mortgage did not cease to exist as an encumbrance when the order absolute was obtained in the mortgage suit, that under the provisions of section 316, Civil Procedure Code, the title to the property sold vested in the defendant No. 1 as against the mortgagor and persons claiming through or under him from the date of the sale certificate, that up to the date of such certificate, the title of the defendant No. 1 as owner was inchoate and incomplete, and in fact, subject to be lost, that till the sale was confirmed, he was entitled to rely on his mortgage, that what was sold at the revenue sale, was the property as it existed at the time of the default, and that at the time of the default, the mortgage of defendant No. 1 was an existing encumbrance.

In support of these contentions reference has been made to section 28 of Act XI of 1859 and Schedule A as showing that the title of the purchaser at a revenue sale relates back to the date of default, and it has been argued on this basis that the property purchased must be the property in suit as it existed at the date of default.

The first two points which have been advanced in support of the appeal may be considered together. It has been contended that the right of a purchaser to property sold in execution of a decree of the Civil Court accrues from the date of the sale, though it may not be complete till after confirmation, and in support of this view, the cases of *Bhyrub Chunder Bundopadhyaya v. Soudamini Dabee* (4), *Dagdu v. Pancham Sing Gangaram* (5), and *Abbas Peada v. Queen Empress* (6), are relied on. In the first of those cases, a Full Bench of this Court held that the purchaser of a property at a sale in execution of a decree of a Civil Court is

(1) (1874) 14 B. L. R. 170.

(2) (1895) I. L. R. 22 Calc. 641.

(3) (1901) I. L. R. 29 Calc. 223.

(4) (1876) I. L. R. 2 Calc. 141.

(5) (1892) I. L. R. 17 Bom. 377.

(6) (1898) 2 C. W. N. 484 (489).

liable for Government revenue accruing on that property between the date of sale and the date of confirmation on the ground that the interest of the debtor in the property ceased from the date of the sale. In the second case the Bombay High Court held that when two persons had on different dates purchased the same property at auction sales in the Civil Court in execution of different decrees and when the purchaser at the later sale had obtained confirmation of his sale before the other purchaser, still the latter as purchaser at the earlier sale had acquired a title to the property which was perfected on confirmation and therefore that the purchaser at the later sale acquired nothing by this purchase.

In the third case it was held that the title of the purchaser related back to the date of sale.

No doubt these cases are ample authority for the contention that the title of the purchaser at an auction sale in a Civil Court will relate back from the date of confirmation to the date of sale so as to defeat all intermediate encumbrances or alienations, but these cases do not help us to determine whether what was sold at the revenue sale was the share as it existed on the date of default, or on the date of actual sale. The cases of *Umatara Gupta v. Uma Charan Sen* (1), and *Chowdhry Jogesur Mullick and others v. Khetter Mohan Pal* (2) to which we have been referred no doubt lay down that a purchaser of an estate at a sale for arrears of Government revenue is not affected by any encumbrances or alienations created by the defaulter between the date of default and the date of sale as under section 28 of Act XI of 1859, the title to the estate vests in the purchaser from the date of default. But in the present case the question for determination depends not so much on the date when the title of the purchaser at the revenue sale vested as on the date when, if at all, the mortgage or encumbrance on the estate held by defendant No. 1 ceased to exist. Nor does the decision of the Full Bench of this Court in the case of *Bibijan Bibi v. Sachi Bewah* (3) to which we have been referred seem to me to assist us in determining the question which is before us. That case hardly supports the present contention of the appellants that the mortgage lien of the defendant No. 1, on the property which he purchased on the 19th March 1900 in execution of his mortgage decree was extinguished before his sale had been confirmed.

I am unable therefore to hold that the two first contentions

(1) (1904) 3 C. L. J. 52.

(2) (1889) I. L. R. 17 Calc. 148

(3) (1904) I. L. R. 31 Calc. 863.

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advanced on behalf of the appellant have been maintained. The case of *Prem Chand Pal v. Purnima Dasi* (1), on the other hand goes to support the contention of the respondents that on the date when the share fell into arrears for Government revenue, the share was subject to the unconfirmed sale held in execution of the mortgage decree and that the unconfirmed sale constituted an encumbrance on the mortgaged property which formed part of the share sold.

The third contention however raises a question of much difficulty and importance, *viz.*, whether because the sale to defendant No. 1, had been confirmed on the 23rd April 1900 he became in consequence an owner of the property at the time of the revenue sale on the 6th June 1900 and therefore under that sale all his rights passed to the purchaser. In support of this contention reliance has been placed for the appellants on the decision of this Court in the case of *Annoda Prosad Ghose v. Rajendra Kumar Ghose* (2), and the decision of their Lordships of the Privy Council in the case of *Shyam Kumari v. Rameswar Singh* (3). In the former of these two cases the plaintiff had purchased in execution of a Civil Court decree an estate which was subsequently sold for arrears of Government revenue and purchased by a third person who took possession. In a suit brought by the plaintiff to recover possession from the purchaser on the ground that plaintiff's purchase was an encumbrance on the property and that under the provision of section 54 of Act XI of 1859, the purchaser had purchased the share subject to the encumbrance, it was held that the words 'the purchaser shall not acquire any rights which were not possessed by the previous owner or owners' in section 54 of Act XI of 1859 mean that the purchaser shall not acquire any rights not possessed by the previous owner or owners at any time and shall acquire no more than what was the property of the previous owner or owners: they do not mean any right not possessed by the previous owner or owners at the time of sale. It was pointed out in that judgment that the words do not mean that if the previous owner has parted with all his rights before the property is put up for sale, the purchaser at such sale shall acquire nothing. In that case the purchase under the Civil Court decree was some months before the default. It was held that the purchase was not an encumbrance and that the purchaser at the revenue sale was entitled to the whole of the property sold.

(1) (1888) I. L. R. 15 Calc. 546.

(2) (1901) I. L. R. 29 Calc. 223.

(3) (1904) I. L. R. 32 Calc. 27.

The present case is different. The decree in execution of which the defendant purchased was a mortgage-decree, which constituted an encumbrance on the property sold. The sale in satisfaction of the mortgage-decree was not confirmed till after the default in payment of the Government revenue and the case of defendant No. 1 is that as it was an existing encumbrance at the time of default, the plaintiff cannot obtain possession of the property sold in execution of the mortgage-decree until he has discharged the whole mortgage-debt. The decision in that case can hardly be accepted as directly meeting the difficulties in the present case.

The decision of the Privy Council in the case of *Shyam Kumari v. Rameswar Singh* (1) was arrived at on the following facts. The respondent instituted a suit on a mortgage-bond executed in his favour, obtained an *ex parte* decree and in execution of the same sold up and on the 17th February 1896 purchased with others an estate called Bisli Kaithahi. The appellants who were puisne mortgagees were not made parties to the suit. The respondent obtained his sale certificate on the 21st March and was put in possession on the 29th April 1896. Default was made by the proprietors, his mortgagors in payment of the Government revenue on the estate on the 12th January 1896 and on the 25th March 1896, the estate was sold under Act XI of 1859 for arrears of Government revenue and purchased by the respondent. A suit was afterwards instituted by the second mortgagees under a mortgage which covered Bishli Haibalie as well as other estates against the mortgagors making the respondent a party defendant. The mortgagor did not defend the suit but the respondent pleaded that under his purchase at the revenue sale he had acquired the estate free of all encumbrances including the mortgages of the plaintiffs. His plea was allowed in the Courts of first instance and first appeal and the suit was dismissed. On appeal to the Privy Council, their Lordships held that at the time of the revenue sale the respondent was a proprietor of the estate within the meaning of section 53 of Act XI of 1859 and therefore that he had taken it subject to the encumbrances existing at the time of sale and that neither the fact that the sale by the Civil Court was subsequent in date to the default for arrears of revenue nor the further circumstance that under the revenue sale certificate, the purchase related back beyond the actual date of the sale and took effect from the

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(1) (1904) I. L. R. 32 Cal. 27.

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13th January 1896, altered the ownership of the estate nor made the respondent any the less a proprietor. Further in discussing the date to be looked at in determining the result of a sale in such a case, their Lordships held that 'when the Act is considered as a whole it seems clear that when sale or purchase is spoken of in connection with time, the time meant is that at which the sale takes place in fact not that to which its operation is carried back by relation.'

Applying the principles laid down in that case to the present, it has been contended for the appellants that the title of the defendant No. 1 at the date of the revenue sale and not at the date of default must prevail and as at that date he had become an owner of the shares in the 4 villages included in the *ijmali* share which was sold for arrears of revenue, his encumbrance under the mortgage had ceased to exist and therefore that the plaintiffs were entitled to obtain possession of the shares in the villages from him. It has been argued that the sequence of events in the present case go even further than those in the case which was before the Privy Council to support the view which was taken by their Lordships. In the present case the sale to the defendant No. 1 in satisfaction of his decree on his mortgage preceded the date when the default was made in the payment of the Government revenue and the sale certificate was issued to the defendant No. 1 before the date of the revenue sale. The learned pleader for the appellant has also argued that in the present case no question of principle is involved, but that all that has to be decided is what is the proper interpretation of the provisions of the Revenue Sale Law.

It seems however, a matter of doubt whether the decision of the present case does not involve a question of principle and whether the dictum of their Lordships of the Privy Council was intended to be of general application or only to apply to the peculiar facts of that case. In dealing with the case before them and noticing that no decision precisely applicable to the facts was to be found in the Indian Law Reports, their Lordships remark that the circumstances of the case are peculiar and such as probably do not often occur, and amongst them they notice the important circumstances that there had been a sale of an estate at a revenue sale for arrears of revenue and a purchase by the same person who had previously bought the same estate at an execution sale in a Civil Court. They observe that the respondent

when he purchased at the revenue sale was apparently a proprietor purchasing an estate of which he was a proprietor : and they note that under section 53 of Act XI of 1859 such a proprietor so purchasing acquired the estate subject to all encumbrances existing at the time of sale. They point out that in that case the argument for the respondent amounted to this that at the execution sale in the Civil Court what he really bought was not the estate but the right to receive any surplus sale proceeds of the estate when it should be sold for arrears of revenue, and express their dissent from that view. They lay down that liability to sale is not the same thing as sale and that until a revenue sale takes place the ownership of the estate remains as it had been *except so far as the provisions of the Act interfere with it*, and that the proprietors mentioned in section 53 upon whom the disability is imposed cannot be restricted to defaulting proprietors and they refer to the case of *Abdool Bari v. Ramdass Coondoo* (1), in which a similar view was taken by this Court in 1878. Then dealing with the question of what is to be regarded as the date of sale they remark that it would be a strained construction in any case to say that the date of default, from which under the provisions of section 28 and schedule A of Act XI of 1859 the title is to be deemed to have vested in the purchaser, is *the date to be looked to in saying whether a purchaser was a proprietor when he purchased.*

Between the circumstances of the present case and those of that which was before their Lordships of the Privy Council there are several important points of difference. In the present case the purchaser at the revenue sale is not the same person who purchased at the execution sale in the Civil Court and he is not setting up rights under the mortgage which by his own act in purchasing the estate at the revenue sale he may be held to have defeated, as was the case before the Privy Council. Here the purchase at the execution sale seems originally to have been made in ignorance of the default and it is not clear that the confirmation of the sale was not obtained in similar ignorance. But whether the latter fact be correct or not the person who seeks to defeat the rights of defendant No. 1 under the mortgage is the plaintiff, a third person who purchased at the revenue sale. The plaintiff further seeks to avoid the right of defendant No. 1 under his mortgage on the ground that the provisions of section 54 of Act XI. of 1859, on which the defendant relies, do not

(1) (1878) I. L. B. 4 Calc. 607.

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apply. In the case before the Privy Council the question was whether the provisions of section 53 of the Act applied. The two provisions of the Act differ in this that a co-sharer proprietor purchasing an estate at a sale for arrears of revenue, by such purchase acquires the estate subject to all its incumbrances *existing at the time of sale* while the purchaser of the share of an estate acquires it subject to all incumbrances and shall not acquire any rights which were not possessed by the previous owner or owners. It seems open to doubt whether the defaulters if they had purchased could have avoided the incumbrance of defendant No. 1.

Further in the case before the Privy Council the mortgage debt of the respondent appears to have been fully discharged by the sale of the property to him in execution of his decree. In the present case the property in suit was sold to the defendant No. 1 for less than one half of his mortgage debt and the balance still remains outstanding.

The effect of applying to the present case the principle contended for on behalf of the appellants would apparently be to discharge the mortgage of defendant No. 1 leaving him as proprietor of the share in the four villages out of the 71 villages which made up the *ijmali kalam* which was sold for arrears of revenue, a share in the sale proceeds which would bear to the whole proceeds the same proportion as the value of the share in the 4 villages bears to the value of the whole *ijmali kalam*. The property at the revenue sale sold for Rs. 13,100 and such a share would cover only a small portion of the mortgage debt which was due to the defendant No. 1 under his decree.

Moreover in the case before the Privy Council it appears to have been held that the appellants were still bound to redeem the prior mortgage of the respondent though he was not entitled to set up his purchase at the revenue sale to entirely defeat their rights as puisne mortgagees.

It has been held in the present case that the mortgage of defendant No. 1 was a valid transaction for consideration. In due course he brought his suit to recover the debt due under the mortgage, obtained a decree and sold up and himself purchased the mortgaged property in part satisfaction of his debt. Subsequently but prior to confirmation of his sale, the property fell into arrears, a fact of which he appears to have been in ignorance and his sale was confirmed before the property was brought up for sale for arrears of revenue. Apparently all the acts of defen-

dant No. 1 were perfectly *bonafide* and honest, while as to the acts of the other side the Subordinate Judge on the evidence expresses some suspicion. The purchaser at the revenue sale claims to be entitled to recover possession of the mortgaged property purchased by the defendant on the ground that at the time of the revenue sale the defendant was a part proprietor. If the claim be allowed the result will be that defendant No. 1 having sued on his mortgage and executed his decree will not be able to sue again on the mortgage deed. A portion of the amount recovered under the decree he may as part proprietor of the *ijmali kalam* be able to realise out of the sale proceeds and the balance of the decretal amount not recovered at the sale he may be able to realise by a personal decree under section 90 of the Transfer of Property Act against the mortgagors.

The result then of accepting as the date on which the title of the purchaser at the revenue sale in the present case vested, the date on which the sale actually took place would be to cause the defendant No. 1 a serious loss for which he cannot be held to be responsible as he was ignorant that the share was in default when he made the purchase. In the case before their Lordships of the Privy Council the respondent who purchased at the revenue sale was aware that he had previously purchased the property in execution of the decree on his mortgage.

If, on the other hand, the provisions of section 28 and of schedule A of the Act be accepted as determining the date from which the title of the plaintiff's vendor as purchaser at the revenue sale vested, the defendant No. 1 will be protected from what appears to be nothing less than serious injustice.

So far as the mortgage in favour of defendant No. 1 is concerned it can hardly be held to have been extinguished until the sale of the property to him was confirmed. Dealing with the principle of "transit in rem judicatum" in the case of *Drake v. Mitchel* (1), Lord Ellenborough remarked, "But a judgment recovered in any form of action is still but a security for the original cause of action until it be made productive in satisfaction to the party and therefore till then, it cannot operate to change any other collateral concurrent remedy which the party may have" (see Ghose on the Law of Mortgage in India", 3rd Edition p. 552).

In strict accordance with the provisions of the Act, it would appear that the mortgage in favour of defendant No. 1

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(1) (1803) 3 East. 251 ; 7 R. R. 449.

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was an encumbrance on the share in the hands of the purchaser at the revenue sale.

If we consider the question of principle as bearing on the present case there would seem to be much to support the same conclusion. It is now accepted as law that a mortgage is not necessarily destroyed where the incumbrancer buys the property which is subject to his charge though he takes no distinct steps to keep it alive. (*Hayden v. Kirkpatrick*) (1), and in the case of *Gokuldass v. Rambux* (2), it was held by their Lordships of the Privy Council that where the mortgagor's right, title and interest were sold subject to a first and second mortgage and the purchaser afterwards paid off the first mortgage without taking an assignment of it in the name of a third person, the latter security was not extinguished, a formal transfer not being essential for the purpose of keeping the mortgage alive or even the formal expression of an intention to do so. Their Lordships remarked. "The obvious question to ask in the interests of justice, equity and good conscience is what was the intention of party paying off the charge? He had a right to extinguish it and a right to keep it alive. What was his intention? If there is no express evidence of it what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interest." No doubt the principle has been applied to the case only of a prior mortgagee using a discharged mortgage as a shield for his protection against subsequent incumbrancers. But is there any reason why the principles should not be applied to a case like the present? The purchaser of a share of an estate at a sale for arrears of Government revenue acquires under section 54 of the Revenue Sale Law the share subject to all incumbrances, and where a mortgagee in ignorance that the share is in default enforces his rights under mortgage and sells up the hypothecated property which forms a part of the share and when the sale is not perfected before default, is there any reason why he should not be allowed to use his mortgage to protect his rights against the auction purchaser at the revenue sale? In my opinion it is only equitable and right that he should be allowed to do so. There can be no doubt that if he had been aware of the default and the risk of sale of the share for realization of the arrears of revenue, his intention would have been to keep his mortgage alive. It seems inequitable that he should have to suffer for his

(1) (1865) 34 Beav. 645. (2) (1884) L. R. 11 I. A. 126; I. L. R. 10 Calc. 1035.

ignorance. On the ground of principle also therefore I am of opinion that the defendant No. 1 is entitled in the present suit to plead as against the plaintiff's claim that his mortgage was an existing incumbrance on the share when sold, that is to say, on the date on which the right of the plaintiff's vendor vested in the share.

The question then arises whether defendant No. 1 is entitled to set up his purchase under his mortgage decree as an absolute bar to the plaintiff's claim to recover the property in suit. I think not. He is, however, in my opinion, entitled to say that before the plaintiff can recover possession he must pay off the debt due under the mortgage. It would follow therefore that the plaintiff in this case is only entitled to a decree in the present suit for possession of the property in suit subject to the condition that he must first discharge the mortgage debt, due to the defendant No. 1. An account of the same should be taken and on the plaintiff's discharging that debt within six months from the date of the preparation of the decree, he will be entitled to obtain possession from defendant No. 1 of the property in suit. On his failure to make such payment within the date fixed, the suit of plaintiff will stand dismissed and the title of the defendant No. 1 in the property in suit will stand confirmed.

Costs should be borne by each party.

Mookerjee J.—The facts which have given rise to the litigation out of which the present appeal arises, lie in a narrow compass, and have not been disputed before this Court. The subject matter of the dispute between the parties is a share in four villages to which the plaintiff appellant as also the first defendant respondent claim to have acquired title, the former by purchase at a sale for arrears of revenue under section 13 of the Revenue Sale Law, and the latter by purchase at a sale in execution of a mortgage decree. It is admitted that the share in four villages now in dispute together with a similar share in 67 other villages, constituted the residuary share of an entire estate Azamgarh, which bears Touzi No. 444 on the Revenue Rolls of the Collector of the District of Gaya. On the 28th March 1900, the residuary estate fell into arrears; it was sold by the Collector under section 13 of Act XI of 1859, and was purchased by the plaintiff's husband Durga Pershad, the third defendant to this suit, in the name of his agent Hulas Narain, the second defendant. An attempt was made to set aside the sale on behalf of the defaulters, but was unsuccessful, and the appeal to the Commis-

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sioner was dismissed on the 7th February 1901, on which date, therefore, the sale became final and conclusive under section 27 of Act XI of 1859. A certificate of title was issued to the purchaser on the 3rd April 1901, and under section 28, the purchase took effect from the 29th March 1900. Subsequently, on the 5th July 1901, delivery of possession was made to the purchaser by the Collector. On the 15th July 1901, the second defendant executed in favour of the third defendant an Ekrar-nama by which he was admitted to be the real purchaser, and on the 20th September 1902, the latter executed a deed of gift in favour of his wife, the present appellant. The title of the first defendant, respondent, is founded upon a mortgage executed in his favour on the 9th August 1886 by the proprietor in respect of the share of the four villages now in dispute. On the 12th September 1898, the mortgagee sued to enforce his security, and on the 31st May 1899, obtained an *ex parte* decree, which was made absolute on the 19th December following. The decree was executed, and on the 19th March 1900, the mortgaged properties were purchased by the decree-holder. On the 23rd April 1900, the sale was confirmed, and a sale certificate granted to the purchaser who obtained delivery of possession on the 12th July following. Upon these facts, the plaintiff contended that the effect of the revenue sale was to pass the share of the estate to the purchaser free of the interest of the respondent, who had become a joint proprietor of the residuary share of the estate by his purchase on the 19th March 1900, and whose title had been perfected on the 23rd April 1900. The Subordinate Judge over-ruled this contention, and held that the revenue sale of the residuary share did not extinguish the right of the defendant under the mortgage and the auction purchase. The Subordinate Judge also observed that it was extremely doubtful whether the purchase by the second defendant was for the benefit of the third defendant or of the intentional defaulters; he further suspected that the gift in favour of the plaintiff had been made with some ulterior object. In this view of the matter, he dismissed the suit with costs. The plaintiff has appealed to this Court, and on her behalf the decision of the Subordinate Judge has been challenged on the ground that the view taken by him as to the effect of the revenue sale upon the title of the respondent is based upon an erroneous construction of section 54 of Act XI of 1859. It has also been argued that there is no foundation for the doubt entertained by the Subordinate Judge as to

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whether the third defendant was the beneficial purchaser at the revenue sale and whether the gift by him to his wife was a genuine transaction. This latter point may be briefly disposed of, as it has not been seriously contested on behalf of the respondent. Upon the evidence as it stands, there can be no possible question that the third defendant was the real purchaser at the revenue sale, and that whatever title he acquired, was transferred to the plaintiff under the deed of gift. The point was, no doubt, raised in the Court below by the defendant, but no endeavour was made by him to rebut the evidence adduced on the side of the plaintiff. I must take it, therefore, that the plaintiff has acquired the rights of her husband who was the purchaser at the revenue sale, and the substantial question which calls for decision is as to the effect of the revenue sale upon the title of the defendant respondent.

The solution of the question raised before us depends upon the construction of section 54 of the Revenue Sale Law which provides as follows: "When a share or shares of an estate may be sold under the provisions of section 13 or section 14, the purchaser shall acquire the share or shares subject to all encumbrances and shall not acquire any rights which were not possessed by the previous owner or owners." It appears to be clear that a purchaser under section 13 does not acquire merely the right, title and interest of the defaulting proprietor, as the Subordinate Judge appears to have thought, but, as laid down in *Debi Das Chowdhuri v. Bipro Charan* (1), he takes the share itself which is exposed for sale, subject to the limitations prescribed in the section. In that case, the share which was sold was owned by a Hindu widow; it was contended that the purchaser had taken nothing but the limited interest of the widow in her husband's estate. Mr. Justice Pigot over-ruled this contention and observed that as the result of a sale under section 13, the whole share in respect of which the arrears may have been due, passes to the purchaser, because the words "shall not acquire any rights" in section 54 refer to the acquisition of rights in respect of interest, such as encumbrances or the like, which are referred to in the previous phrase of that section. If, therefore, it is the entire share which, upon a sale for arrears of revenue, passes to the purchaser, the question arises what are the limitations subject to which the purchaser takes it.

The section provides affirmatively, in the first place, that

(1) (1895) I. L. R. 22 Calc. 641.

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the purchaser acquires the share subject to all encumbrances, and, negatively, in the second place, that the purchaser does not acquire any rights which were not possessed by the previous owner. The first point, therefore, which requires consideration is whether the interest of a person who has acquired by purchase, the rights of the owner constitutes an encumbrance within the meaning of the section. It was not disputed, and, in my opinion, could not be reasonably disputed, that if a person acquires the interest of the original owner of the estate *before the default is made*, his interest cannot be said to be an incumbrance, and passes by the sale to the purchaser, because what is sold is in essence his share in the estate. It was argued, however, by the learned vakil for the respondent that if a person acquires by purchase the interest of the owner after the latter has made default, and before the revenue sale takes place, his position is that of an incumbrancer, and the purchaser at the revenue sale takes the share of the estate subject to his interest. The contention, thus broadly formulated, does not appear to be well founded on reason and principle, and is opposed to a series of decisions of this Court. So far back as 1874, it was ruled by this Court in *Gungadeen Misser v. Kheeroo Mundul* (1), that a sale under section 13 passes to the purchaser the share of the defaulting shareholder in the entire estate as registered in the Collector's books, that is, an undivided share if registered under section 10, and a specific portion of the estate, if registered under section 11; the purchaser, therefore, takes the undivided share and not merely such portion of the estate as the defaulting shareholder may have chosen as between himself and the other shareholders for any reason to take as equivalent to his undivided share. It is obvious that if the opposite view were adopted, the rights of the purchaser at the revenue sale might be completely defeated by an alienation made by the defaulter after he had made default in paying the Government revenue. A similar question was raised in the case of *Prem Chand Pal v. Purnima Dasi* (2) in which Mr. Justice Beverley reserved his opinion upon the question, whether or not the words "the previous owner or owners" in section 54 of Act XI. of 1859 are to be understood as meaning the owners who made the default or the owners at the time of the sale. The question, however, was raised and decided in the case of *Annoda Prosad Ghose v. Rajendra Kumar Ghose* (3).

(1) (1874) 14 B. L. R. 170 ; 22 W. R. 449.

(2) (1888) I. L. R. 15 Calc. 546.

(3) (1901) I. L. R. 29 Calc. 223.

In that case, the contest was between the purchaser at a revenue sale of a share of an estate held on the 30th December 1894, and the purchaser of the right, title and interest of the owners at a sale in execution of a money decree held on the 22nd August 1894, and confirmed on the 24th September following. It was ruled by this Court that the title of the purchaser at the revenue sale must prevail, because the words, "the purchaser shall not acquire any rights which were not possessed by the previous owner or owners" in section 54 do not mean that the purchaser at the revenue sale shall only acquire the rights possessed by the previous owner or owners at the date of the sale. The learned Judges pointed out that the words "at the date of the sale" which find a place in section 53 do not occur in section 54; consequently, the words of the section mean that the purchaser shall not acquire any rights not possessed by the previous owner or owners at sometime or another, and shall acquire no more than what was the property of the previous owner or owners. This view is substantially in agreement with that adopted by this Court in the cases of *Jogessur Mullick v. Khetter Mohun Pal* (1) and *Umatara Gupta v. Uma Charan Sen* (2) in which it was held that the purchaser at a sale for arrears of revenue of a share of an estate under section 13 does not take the property subject to encumbrances, (in both instances a mortgage), created after the date of the default and before the date of the revenue sale. As pointed out in *Anmoda Prosad v. Rajendra Kumar* (3), the adoption of the contrary view would enable the defaulting proprietor, either to part with his rights in the share or create an encumbrance thereon to such an extent after he has made default, as to make it practically unavailable for realization of the arrears of revenue due upon it: if this was allowed, there would be no protection for the revenue, as the purchaser at the sale might in reality acquire nothing. It follows, consequently, that a purchaser of the interest of the proprietor, after default and before the revenue sale, is quite as much bound by the revenue sale as the proprietor himself, because in substance, he occupies the position of the proprietor. In this view of the matter, it must be held that the first defendant, in so far as his title is based upon his purchase at the mortgage sale, is bound by the revenue sale which is the foundation of the title of the plaintiff. This leads, however, to the second question, namely, whether it is open to the first defendant to fall back upon his mortgage, and to contend that

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(1) (1889) I. L. R. 17 Calc. 148.

(2) (1904) 3 C. L. J. 52.

(3) (1901) I. L. R. 29 Calc. 228.

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the plaintiff has purchased under section 54 of the revenue sale law the residuary share of the estate subject to this encumbrance.

It has been argued by the learned vakil for the first defendant respondent that under Schedule A to Act XI of 1859, the title of the plaintiff dates back to the day after that fixed for last day of payment of revenue, that is, to the 29th March 1900, that upon the authority of the cases of *Umatara v. Uma Charan* (1) and *Chowdhry Jogessur v. Khetter Mohan* (2), the plaintiff takes the property free of encumbrances, if any, created after the default, and, that as on that date the defendant had still his lien in force on the disputed share of the estate, the purchase of the plaintiff must be taken to have been subject to that encumbrance. It has been argued, on the other hand, by the learned vakil for the plaintiff appellant, that there are two answers to this contention, namely, first, that the decision of the Judicial Committee in *Sham Kumari v. Rameswar Singh* (3), shows that the rights of the plaintiff must be determined with reference to the position which the defendant occupied on the date of the revenue sale and not on the date of default, and secondly, that as the purchase of the defendant was made on the 19th March 1900, that is before the date of default, the mere fact that the execution sale was not confirmed till the 23rd April 1900, that is, after the default, does not justify the conclusion that he did not become the proprietor of the estate till the date of the confirmation of the sale. The questions raised are by no means free from difficulty and require careful consideration.

The first branch of the contention of the appellant raises the question whether we are to consider the rights of the defendant as they stood at the date of default or on the date of the revenue sale. It is argued on behalf of the appellant, upon the authority of *Sham Kumari v. Rameswar Singh* (3), that the respondent cannot ignore his purchase at the execution sale and fall back upon his mortgage. To appreciate the principle laid down by their Lordships of the Judicial Committee, it is necessary to refer for a moment to the circumstances of that case which appear to have been as follows. The plaintiff sued to enforce two mortgage bonds, dated 23rd June and 30th December 1894. The contesting defendant, the Maharaja of Durbhanga, was a prior mortgagee under a bond, dated 8th November 1892. The defendant obtained an ex parte decree against the mortgagors on the 22nd January 1895; to this suit the plaintiff, puisne incumbran-

(1) (1904) 3 C. L. J. 52.

(2) (1889) I. L. R. 17, Calc. 148.

(3) (1904) I. L. R. 31 I. A. 176; I. L. R. 32 Calc. 27.

cer, was not a party. The defendant purchased in execution of his own decree on the 17th February 1896 ; the sale was confirmed on the 24th March, and possession delivered on the 29th April following. In the meantime, the proprietors of one of the estates covered by the mortgage had made default in payment of Government revenue on the 12th January 1896. On the 25th March 1896, the property was sold under Act XI of 1859, and purchased by the Maharaja who had already purchased at the sale in execution of his own decree. The question arose as to whether the purchase by the Maharaja at the revenue sale had extinguished the mortgage of the plaintiff so as to disentitle the latter from exercising his right of redemption. The plaintiff contended that on the date of the revenue sale, the Maharaja, by reason of his antecedent purchase in execution of his own decree, had already become the proprietor of the estate, and that consequently the purchase by him at the revenue sale was a purchase by an unrecorded proprietor within the meaning of section 53 of Act XI of 1859, with the result that the Maharaja by his purchase at the revenue sale acquired the estate subject to encumbrances existing at the time of the sale, that is subject to the mortgage in favour of the plaintiff. It was argued, on the other hand, on behalf of the Maharaja that he did not become a proprietor by his purchase at the mortgage sale which took place after default, that, in other words, he did not occupy a higher position than a mortgagee entitled to a charge upon the surplus sale proceeds, and that, consequently, by his purchase at the revenue sale, he acquired precisely the same rights as a stranger would have done. Their Lordships overruled this contention of the Maharaja, and observed that until a revenue sale takes place, the ownership of the estate remains as it has been, except in so far as the provisions of the Act interfere with it. With regard to the contention of the Maharaja " that the purchase at the revenue sale having by the terms of the sale certificate related back to the day after that on which the default occurred, that was the date to be looked at for the present purpose and that at that date the respondent was not the proprietor because it was before the execution sale," their Lordships ruled that this position was unsustainable, and observed as follows: "It is true that under section 28 and Schedule A, the sale certificate is to specify, as the date from which title is to be deemed to have vested in the purchaser, the day after that fixed as the last date of payment, and that that is the date from which the

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purchaser becomes entitled to the rents and profits on the one hand and liable to pay the revenue on the other. But it would be a strained construction in any case to say that that is the date to be looked to in saying whether a purchaser was a proprietor when he purchased. And when the Act is considered as a whole, it seems clear that when sale or purchase is spoken of in connection with time, the time meant is that at which the sale takes place in fact, not that to which its operation is carried back by relation." Their Lordships further observed in an earlier passage that section 54 which deals with sales of shares of estates impose limitations upon the rights of purchasers similar to those imposed in section 53 and that the disability is certainly not confined to defaulters. It was contended on behalf of the appellant in the case before us that if these principles be applied to determine his rights, the defendant has no title at all. It was argued that on the date of the revenue sale, the title of the defendant under the mortgage sale had already been perfected; he was on that date the proprietor of the share of the estate; if his rights are determined as they stood on that date, it is not open to him to ignore his purchase and to fall back upon his mortgage security, which, it may be assumed for the present purpose, had not been extinguished on the date of default. No doubt, the principles laid down by their Lordships of the Judicial Committee in *Sham Kumari v. Rameswar Singh* (1), lend some apparent support to the contention that the mortgagee cannot be permitted to do so. It may be conceded that in that case, if the Maharaja had been permitted to ignore his purchase at the mortgage sale and to rely upon the condition of things as they existed at the date of default, the inference would have been irresistible that his purchase at the revenue sale was not a purchase by a proprietor. It was consequently suggested on behalf of the appellant that if in the case before us, the contention of the respondent prevails, section 54 which provides that the purchaser shall not acquire any rights which were not possessed by the previous owner or owners, would mean that the purchaser shall not acquire any rights not possessed by the defaulter on the date of default. It was also strenuously contended that such an interpretation would be opposed to the current of authorities in this Court as also to the spirit of the decision of the Judicial Committee in *Sham Kumari v. Rameswar Singh* (1). Before I examine the validity of this line of argument, it is necessary to point out

(1) (1904) L. R. 31 I. A. 176.

that when section 54 speaks of the purchaser acquiring the share subject to all encumbrances, reference is made to valid encumbrances existing as such on the date of the revenue sale. No doubt, the cases of *Chowdhry Jogessur v. Khetter Mohun* (1) and *Umatara v. Uma Charan* (2) show that the purchaser does not acquire the share subject to encumbrances created since the date of default, because by reason of the title of the purchaser relating back to the day after the date of default, all encumbrances created after that date must be treated as void against the purchaser. But, because the purchaser does not take subject to encumbrances created after default, it does not follow conversely that the purchaser necessarily takes subject to all encumbrances created before and existing on that date, no matter whether the encumbrances continue to exist at the date of the revenue sale. To take an illustration. Suppose a share of an estate is subject to a mortgage; default is made in payment of Government revenue; the share is sold under section 13 of Act XI of 1859; but after default and before the sale, the mortgagor satisfies the debt due to the mortgagee. Does the purchaser take the share, subject to the mortgage, because on the date of default to which his title relates back, the encumbrance existed on the share subsequently purchased by him? The answer ought to be in the affirmative, if the broad contention put forward by the respondent, namely, that the rights of the parties must be regulated in every case and under all possible conditions according to the circumstances as they stood on the date of default, is well founded. It is difficult to imagine, however, upon what intelligible principle such a conclusion can be supported. The true rule appears to be that although the purchaser does not take subject to any encumbrances created after the default, he takes subject to such encumbrances only as have been created before default and are in actual existence, because undischarged, or though discharged, may, upon equitable principles, be allowed to be set up on the date of the revenue sale.

If now we turn to the contention of the appellant, it is clear that the decision of the Judicial Committee in *Sham Kumari v. Rameswar Singh* (3) is distinguishable from the present case on more than one substantial ground. In the first place, that case turned upon the construction of section 53 of the Revenue Sale Law, the language and scope of which are materially different from those of section 54 which is applicable to the present case;

(1) (1889) 1 L. R. 17 Cal. 148.

(2) (1904) 3 C. L. J. 52.

(3) (1904) L. R. 31 I. A. 176.

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under the one section, the purchaser takes subject to all encumbrances existing at the time of sale, while under the other, no encumbrance created after default is binding on the purchaser. In the second place, in the case before the Judicial Committee, the purchaser at the revenue sale was the same person as the purchaser at the mortgage sale, and the question was, whether he was entitled to ignore his purchase at the mortgage sale so as to be able to destroy a puisne incumbrance; in the case before us, the purchaser at the revenue sale is a different person from the purchaser at the mortgage sale, and the question is whether the latter is to be allowed to fall back upon his mortgage so that his rights may not be completely extinguished by the former. In the third place, the decree made by the Judicial Committee shows that although the Maharaja was treated as a proprietor when his rights as purchaser at the revenue sale were determined, he was allowed to be redeemed by the puisne incumbrancer as if he was still senior mortgagee; in other words, though by his purchase at the mortgage sale, the Maharaja had become owner, and though his security had thereupon been extinguished as between himself and his mortgagor, he was still treated as prior mortgagee in relation to the subsequent mortgagee whose rights he was not permitted to annul in his character as proprietor—purchaser at the revenue sale. Under these circumstances, I am not prepared to hold that the decision of the Judicial Committee in *Sham Kumari v. Rameswar Singh* (1) concludes the question raised before us, or that, even if the rights of the defendant be determined with regard to the circumstances as they stood on the date of the revenue sale, it is not open to him to fall back upon his mortgage and call upon the plaintiff to redeem her.

The second branch of the contention of the appellant raises the question, whether the mortgage sale having taken place before the date of default in the payment of Government revenue, the defendant did not in substance become the proprietor of the share of the estate even before the default was made. It was argued by the learned vakil for the appellant that the present case is, from this point of view, much stronger than the case before the Judicial Committee. There the order of events was this: *first*, default in payment of Government revenue in respect of an estate; *secondly*, sale of that estate in execution by a Civil Court; *thirdly*, sale of the estate at a revenue sale for

(1) (1904) L. R. 31 I. A. 176.

the default in payment. In the present case, the order of events is as follows : *first*, sale of a share of some villages forming part of an estate, in execution of a decree by a Civil Court ; *secondly*, default in payment of Government revenue ; *thirdly*, confirmation of the sale held by the Civil Court ; *fourthly*, sale of the share of the estate for the default in payment of revenue. Under these circumstances, it was argued by the learned vakil for the appellant, that even if the title of the parties was determined with reference to the condition of things on the date of default, the defendant would be out of Court, because prior to that date he had acquired at least an inchoate right to the property which was perfected by confirmation before the revenue sale. Reliance was placed upon the decision of a Full Bench of this Court in *Bhyrub Chunder v. Soudamini* (1), in which it was ruled that on confirmation of a sale by a Civil Court, the title of the purchaser must be considered to have vested in him from the date of the sale and that consequently the purchaser was liable for the payment of Government revenue which had become due between the date of the sale and the date of its confirmation. It is necessary to observe, however, that this decision was given under Act VIII of 1859, section 259 of which related to the grant of certificate to an auction-purchaser and provided as follows : "After a sale of immovable property shall have become absolute in manner aforesaid (that is, when it has been confirmed under section 256), the Court shall grant a certificate to the person who may have been declared the purchaser at such sale, to the effect that he has purchased the right, title and interest of the defendant in the property sold, and such certificate shall be taken and deemed to be a valid transfer of such right, title and interest." Section 316, however, of the present Code of Civil Procedure, after providing for the grant of certificate to the purchaser, lays down that "such certificate shall bear the date of the confirmation of the sale, and so far as regards the parties to the suit and persons claiming through or under them, the title to the property sold shall vest in the purchaser from the date of such certificate and not before." There has been some divergence of judicial opinion upon the question whether this change in the language of the Statute was intended to alter the law. In the case of *Prem Chand Pal v. Purnima Dasi* (2), it was held by Mr. Justice Norris that the title of the purchaser, whether as regards the parties to the suit and their

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(1) (1876) I. L. B. 2 Calc. 141.

(2) (1888) I. L. B. 15 Calc. 546.

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representatives or as regards strangers, did not vest in him before the date of the confirmation of the sale. In that case, the contest was between a purchaser at an execution sale held on the 17th August 1883 and confirmed on the 18th December 1883, and a purchaser of the share of the estate at a sale for arrears of revenue held on the 26th September 1883. It was ruled that on the date of the revenue sale, the mortgage lien had not been extinguished and the purchaser at the revenue sale took the property subject to the mortgage lien; in this case, however, the execution sale and the confirmation thereof were both before the revenue sale, but the default in payment of Government revenue had intervened between these two events. In the case of *Amir Kazim v. Darbari Mal* (1), the learned Judges of the Allahabad High Court affirmed the view taken in the case of *Govind Ram v. Tulsi Ram* (2), that when immovable property is sold in execution of a decree, the title of the auction purchaser to possession or mesne profits does not accrue until the sale has been confirmed. To the same effect are the decisions in *Gaya Parshad v. Nawab Yusuf Mirza* (3), and *Gaya Parshad v. Sidh Gopal* (4). There is authority, however, in support of the view that, although an auction purchaser does not acquire a full title till the confirmation of the sale, yet upon general principles, he may have equitable rights, arising out of his purchase, before the date of confirmation of the sale; see *Dagdu v. Panchamsingh* (5), *Chiddo v. Peari Lal* (6), *Het Ram v. Baldeo* (7), *Yeshvant v. Govind* (8), *Adhur Chunder v. Aghore Nath* (9), and *Boharia Rudrani v. Ram Pertap* (10). In some of these cases, the title of the purchaser during the period between the date of sale and the date of confirmation, is described as a contingent right to the land, that is, contingent on subsequent confirmation; in others, it is described as an inchoate or an equitable right which is perfected or becomes absolute upon confirmation. In my opinion, section 316 makes it reasonably clear that the full perfected title does not vest in the purchaser before the confirmation, but it cannot be affirmed that he acquires no interest whatsoever in the property before the sale has been confirmed. [Freeman on Executions, Vol III, section 323, and notes to *Robertson v. Vancleave* (11),

(1) (1902) I. L. R. 24 All 475.

(2) (1887) 7 All. W. N. 217.

(3) (1896) Oudh Select Cases No. 300 p. 222.

(4) (1905) 8 Oudh Cases 202.

(5) (1892) I. L. R. 17 Bom. 375.

(6) (1896) I. L. R. 19 All. 188.

(7) (1894) 14 All. W. N. 54.

(8) (1886) I. L. R. 10 Bom. 453.

(9) (1898) 2 C. W. N. 589.

(10) (1906) 11 C. W. N. 158.

(11) (1891) 15 L. R. A. 68.

Yeazel v. Einspahr (1), *Morse v. Hackensack* (2).] It may also be observed that although under section 316, the title to the property sold vests in the purchaser from the date of the confirmation, he does not acquire the right, title and interest of the judgment-debtor as they stand on that date. If he has purchased in execution of a money decree, he takes the property as it stood on the date of attachment and is not affected by any subsequent dealings therewith on the part of the judgment debtor. If he has purchased in execution of a decree on a mortgage he takes the property as it stood on the date of the creation of the mortgage, and persons who have subsequently become interested in different fragments of the equity of redemption cannot claim a superior title. Under these circumstances, it cannot be reasonably held that between the date of sale and the date of confirmation, the auction purchaser stands in the position of an absolute stranger to the property. In the present case, the defendant, who was himself the mortgagee, purchased in execution of his mortgage decree on the 19th March 1900; there was no possibility of the sale being annulled under section 310 (A) of the Civil Procedure Code [*Kedar Nath v. Kali Churn* (3), although a different view has been taken in the other High Courts; *Mallikarjunadu v. Lingamurti* (4), *Ram Singhji v. Chuni Lal* (5), *Krishnaji v. Mahadev* (6).] There was, however, a possibility that an application might be made to set aside the sale under section 311 of the Civil Procedure Code; no such application, as a matter of fact, was made, and the sale was confirmed on the 23rd April 1900. It must be held, therefore, that before default was made in the payment of the Government revenue and the share of the estate fell into arrears on the 29th March 1900, though the defendant had acquired a substantial interest in the property by his purchase under the mortgage decree on the 19th March 1900, yet his title was not perfected till the 23rd April 1900, sometime after the default, and before the revenue sale. I cannot, therefore, accept the contention of the appellant that the defendant was a proprietor at the time of default and that his interest was consequently completely extinguished by the revenue sale.

The last question which requires consideration is, whether the purchase at the revenue sale, upon which the title of the plaintiff rests was subject to the mortgage of the defendant which is the true foundation of the title of the latter. It was

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(1) (1894) 24 L. R. A. 449.

(2) (1891) 12 L. R. A. 62.

(3) (1898) I. L. R. 25 Cal. 703.

(4) (1902) I. L. R. 25 Mad. 244.

(5) (1897) I. L. R. 19 All. 205.

(6) (1900) I. L. R. 25 Bom. 104.

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argued on behalf of the appellant, upon the authority of the decision of this Court in the case of *Bibijan Bibi v. Sachi Bewah* (1), that as soon as the sale was completed, and title vested in the defendant as auction purchaser, his security became extinguished under section 89 of the Transfer of Property Act, and that after the 23rd April 1900, therefore, there was no incumbrance in existence subject to which the appellant could make his purchase at the revenue sale on the 6th June 1900. It was forcibly argued, on the other hand, by the learned vakil for the respondent that although the title of the defendant as purchaser became perfected on the 23rd April 1900 as between himself and his mortgagor, he ought to be allowed to use his security as a shield against the purchaser at the revenue sale. In reply, it was contended on behalf of the appellant, that this doctrine, which has been allowed to be invoked by prior incumbrancer against puisne mortgagees, even after the prior mortgage debt has been converted into a judgment debt [*Surjiram v. Barhamdeo* (2)], should not be extended to a case of the description now before us, because, it was said, the whole question here is as to the rights of the parties under section 54 of the Revenue Sale Law, and no equitable grounds exist upon which this principle can be engrafted upon the rule embodied in the Statute. After anxious consideration of the arguments addressed to us on both sides upon this question, I have arrived at the conclusion that the contention of the respondent ought to prevail. It is quite clear, in the first place, that the mere fact that a judgment has been obtained on a mortgage does not extinguish the debt, and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Statute of Limitations. This view is supported by the decision of Lord Ellenborough in *Drake v. Mitchell* (3), namely, that a judgment recovered in any form of action is still but a security for the original cause of action, until it be made productive in satisfaction to the party. This principle has been recognized in cases of the highest authority which will be found reviewed in the judgment of this Court in *Surjiram Marwari v. Barhamdeo Pershad* (2). It follows, consequently, that the fact that the defendant obtained a decree on his mortgage did not extinguish his security. In the second place, it is clear that although as laid down by this Court in *Bibijan Bibi v. Sachi Bewah*, (1), a security is extinguished upon the actual sale of the mortgaged properties and distribution of the proceeds, yet a mortgagee,

(1) (1904) 1. L. R. 31 Calc. 863.

(2) (1905) 2 C. L. J. 202 at 214.

(3) (1803) 3 East 251; 7 R. R. 449.

who has purchased at a sale in execution of a decree upon his mortgage is entitled to rely upon his mortgage as a shield against a subsequent encumbrancer ; see *Debendro Narain Roy v. Ram-taran* (1). This rule is founded upon the elementary principle that, where a first mortgagee purchases at a sale in execution of a decree on his mortgage, equity will keep his mortgage alive for the purposes of protection against a second mortgagee ; in other words, although the security is extinguished in the sense that the mortgagee purchaser takes the property freed from the lien, the purchaser is entitled to rely upon the mortgage, which is substantially the foundation of his title, as against a puisne encumbrancer. In the third place, as laid down by their Lordships of the Judicial Committee in *Gokuldass v. Rambux* (2) *Mohesh Lal v. Bawan Das* (3) *Dinobundhu v. Jogmaya* (4) and by the House of Lords in *Thorne v. Cann* (5) and *Liquidation Estates Purchase Company v. Willoughby* (6), the question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. The principle upon which this doctrine is founded, is that, although ordinarily when the interests of the mortgagor and the mortgagee are united in the same person, it is not necessary for him to keep them distinct, equity will keep them distinct, where from the intentions of the party, either express or implied, it is for his benefit that they should be so kept ; it depends upon the intention, actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage. Consequently, where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption. The rule, however, is subject to the important qualification that a mortgage will not be kept alive in aid of a fraud or wrong ; a mortgage substantially satisfied may be kept alive in equity, only when this is requisite to the advancement of justice and this will never be allowed when the result will be, from the forms of law, to aid in perpetra-

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(1) (1903) I. L. R. 30 Calo. 599.

(2) (1884) L. B. 11 I. A. 126 ; I. L. R. 10 Calo. 1035.

(3) (1883) L. B. 10 I. A. 62 ; I. L. R. 9 Calo. 961.

(4) (1901) L. B. 29 I. A. 9 ; I. L. R. 29 Calo. 154.

(5) (1895) A. C. 11.

(6) (1898) A. C. 321.

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ting a fraud or an injury ; in other words, although the object of a purchase by a mortgagee at a sale in execution of a decree upon his mortgage is to obtain the equity of redemption and thus become full owner of the property, it may sometimes be an advantage to him to preserve his mortgage title so that he may not be defeated by an intermediate title which ought not justly to supersede or extinguish his title. It was suggested by the learned vakil for the appellant that this doctrine ought to be applied only in cases where a prior encumbrancer has to set up his rights against a second mortgage or a subsequest lien. In my opinion, there is no intelligible reason why the application of this principle, which is founded on broad grounds of justice, equity, and good conscience, should be thus restricted ; the doctrine ought to be allowed to be invoked where the purchaser is met by an intermediate title which ought not, in justice, to supersede his rights, and the recognition of which in supercession of his rights would mean that the satisfaction of the mortgage is completely or partially nullified ; in such a case, if the principle is not applied, the mortgagee is in substance unjustly deprived of his rights not only as purchaser but also as mortgagee. In the case before us, what is the position of the parties ? The defendant sued to enforce his security, obtained a decree, brought the property to sale and purchased it himself on the 19th March, 1900. On that date, his title was not completed and he did not become full owner till the confirmation of his purchase on the 23rd April 1900. Meanwhile, some of the owners of the share of the estate made default in payment of Government revenue on the 28th March, 1900. If the defendant had been aware of this circumstance and, if he had delayed the confirmation of his own purchase till after the revenue sale of the 6th June 1900, he would have been amply protected, because there is no question that in that event the purchaser at the revenue sale would have taken the property subject to his mortgage. Should it then, as between him and the purchaser at the revenue sale, make any difference that his purchase was confirmed before the revenue sale ? In my opinion, it ought not to make any difference. If, again, an application had been made under section 311 of the Code of Civil Procedure to set aside the mortgage sale, and if this application had remained pending till after the revenue sale, even upon dismissal of such application and consequent confirmation of the sale, the defendant would have been entitled to claim that the purchaser at the

revenue sale had taken the property subject to his encumbrance. It would be manifestly unjust to hold that, because by a mere accident the mortgage sale was confirmed four days before the revenue sale, the rights of the defendant have been completely lost. It may be conceded that the position would have been different, if the purchase of the defendant had been completed before the default was made in payment of Government revenue, because such default would then have been *his* default as proprietor, and he would have been responsible for the sale of the property. In these circumstances, I must hold that, although the purchase by the defendant was confirmed before the revenue sale, yet he is entitled to fall back upon his mortgage and use it as a shield against the purchaser at the revenue sale. It may further be pointed out that the defendant, after his title had been completed, could not have, as a matter of right, protected himself from the revenue sale. The default had already been made, and the sale was inevitable, unless indeed he could induce the Collector to exercise his power to exempt the estate from sale under section 18 of Act XI of 1859; but even if he had endeavoured to do so, he could have done it only upon payment of the revenue due for the whole of the share in default, although he himself was interested in a share of four only out of seventy-one villages. These circumstances justify the view that the defendant is entitled to fall back upon his mortgage, and that the purchaser at the revenue sale took the property subject to his encumbrance. It may be pointed out that this conclusion is consistent with the manifest justice of the case. The purchaser at the revenue sale purchased the share in 71 villages for Rs. 13,100. The Government revenue payable for this share was Rs. 4,352. The proportionate amount of Government revenue payable for the share in the four villages mortgaged to the defendant is now known to be Rs. 79-12 as. only. If the value of the properties be assumed to be approximately proportional to the amount of Government revenue payable in respect thereof, it follows that the purchaser at the revenue sale has paid Rs. 240 only for the share in the four villages mortgaged to the defendant. The plaintiff in his plaint states that the market value of this share in the four villages is at least Rs. 10,500. If, therefore, it be held that he has purchased the property free of the encumbrance of the defendant, he obtains for Rs. 240 property which according to his own calculation is worth more than ten thousand rupees. It cannot be suggested that the defen-

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defendant might look to the surplus sale proceeds for the satisfaction of his mortgage ; as I have shown, the proportionate amount of the surplus sale proceeds is Rs. 240 only, whereas the principal amount covered by the mortgage of the defendant is Rs. 5,000, and interest has accumulated upon it from the 9th of August 1886. The purchaser at the revenue sale, therefore, when he paid such a small price may be reasonably presumed to have known that he was taking the property subject to the encumbrance of the defendant. It may also be observed that the amount due to the defendant under his mortgage decree was Rs. 17,000 at the time execution was taken out by him, and if the property is really worth about Rs. 10,000, the value of the equity of redemption is practically insignificant ; this would explain why the purchaser at the revenue sale paid only the nominal sum of Rs. 240 for it. To put the matter in another way, if the contention of the plaintiff prevails and she is allowed to recover the property unconditionally, the plaintiff secures for Rs. 240 property worth more than ten thousand rupees, while the defendant loses all that is due on his mortgage, namely, about Rs. 17,000 ; if, on the other hand, the plaintiff is called upon to redeem the defendant, and declines because she finds it not worth her while to do so, she loses Rs. 240 only ; or, in other words, the purchaser at the revenue sale takes 67 instead of 71 villages for Rs. 13,100, and the defendant mortgagee keeps the four villages in lieu of his dues on his security. Upon all these considerations, the conclusion seems to me to be irresistible that the plaintiff must redeem the defendant before he can obtain possession of the property.

To summarize the conclusions at which I have arrived, they may be briefly stated as follows : (1) the view taken by the Subordinate Judge that the purchaser at the revenue sale purchased merely the right, title and interest of the defaulting proprietors on the date of sale, and consequently purchased nothing, because his interest had already passed to the defendant, is not well founded ; (2) the view put forward on behalf of the appellant that as the purchase of the defendant at the mortgage sale had been confirmed before the revenue sale, the effect of the revenue sale was completely to extinguish his title and vest it in the purchaser at the revenue sale is equally unfounded ; (3) the view put forward by the appellant that the title of the defendant under his purchase at the mortgage sale was perfected with effect from the date of the sale is not well founded ; (4) although the purchase of the defendant at the mortgage sale

was confirmed before the revenue sale, yet as it was confirmed after default and without any knowledge on the part of the defendant that default had been made, the defendant is entitled to rely upon his mortgage and use it as a shield for his protection against the purchaser at the revenue sale.

It appears to have been suggested in the Court below that the purchaser at the revenue sale was affected by the doctrine of *lis pendens*. It may be conceded that as laid down in *Har Shankar Prosad v. Shew Gobind* (1), a purchaser of a share of an estate under section 13 of Act XI of 1859 may be affected by the doctrine of *lis pendens*, if he makes his purchase during the pendency of a litigation to enforce a mortgage upon that property. It may also be conceded that as laid down by this Court in *Surjiram Marwari v. Barhamdeo Persad* (2), in the case of a mortgage suit, the *lis pendens* continues after the decree nisi, and the doctrine of *lis pendens* is applicable to proceedings to realize the mortgage after the decree for sale. Here, however, the purchase by the appellant at the revenue sale on the 6th June, 1900, was effected sometime after the mortgage sale had been confirmed; obviously, therefore, there was no *lis pendens* on the mortgage pending at the date of the revenue sale.

The result, therefore, in my opinion, is that this appeal must be allowed and the decree of the Subordinate Judge discharged. The plaintiff will have a decree for possession conditional upon redemption of the mortgage of the defendant and she will have six months for the purpose. An account will be taken of what is due to the defendant upon his mortgage under his decree of the 31st May 1899. Interest as provided in that decree will be allowed only up to the 12th July 1900, on which date the defendant obtained delivery of possession under his purchase; interest subsequent to that date is set off against the profits which have been received by the defendant from the property in his possession. If the plaintiff does not redeem within six months from the date when the decree of this Court is drawn up and signed, her suit will stand dismissed. Under the circumstances of the case, each party will bear his own costs throughout the present litigation.

Appeal allowed.

(1) (1899) I. L. R. 26 Calc. 966.

(2) (1905) 2 C. L. J. 288.

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PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

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[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
WILLIAM IN BENGAL.]*Civil Procedure Code (Act XIV of 1882), Sec. 283—Suit under it—Stamp on the
plaint—Court Fees Act (VII of 1870), Sch. II, Art. 17, clause (i).—
Declaratory suit and injunction—Value of suit.*

Where a suit is brought under Sec. 283 of the Civil Procedure Code, the proper Court fee payable on the plaint is Rs. 10 under clause (i) of Art. 17 of Schedule II of the Court Fees Act.

Dhondq Sakharan Kulkarni v. Gorind Babaji Kulkarni (1) approved.

When a suit asks for a declaration and for an injunction, it is not one merely for declaratory decree but also for consequential relief.

When a plaintiff seeks to challenge a decree in execution of which his property has been attached, the value of the action is the value to the plaintiff, so that if the execution debt exceeds the value of the property, the latter is the value of the suits; if the execution debt is less than the value of the property, the former is the value of the suit.

In suits to set aside summary decisions as also in those dealing with arbitration awards, the amount of Court Fees payable on the plaint does not depend upon the value of the suit.

Appeal from a decree of the above High Court (December 10, 1903) affirming a decree of the Court of the Subordinate Judge of Purneah (August 27, 1900).

The only question for their Lordships' decision was the determination of the proper Court fee payable on the plaint in the suit.

Chhatrapat Singh (Respondent No. 2) was the owner of pergunnahs Katihar and Kumaripur, bearing Nos. 1175 and 1176 in the registers of the Purneah Collectorate. On September 2, 1893 he sold the said properties subject to a mortgage to the appellant Srimati Bibi Phul Kumari for a cash consideration of Rs. 20,000, the appellant subsequently cleared off the mortgage upon the payment of Rs. 50,000 to the mortgagee. Bibi Phul Kumari obtained possession of the properties and was duly registered as proprietor in the Collector's register.

In or about the year 1898 Ghanshyam Misra (Respondent No. 1) having obtained a decree for money against Chhatrapat Singh, attached the said properties and advertised them for sale in execution of his decree.

[* Reported by J. M. Parikh, Esq., Barrister-at-Law, London.]

(1) (1884) 1 L. R. 9 Bom. 20.

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*October, 29 and
November, 19.*

The appellant objected to the said attachment and applied to the Subordinate Judge of Purneah for removal thereof, claiming the said properties as her own. On April 24, 1899 an order was made rejecting her claim.

On May 30, 1899 the appellant instituted this suit in the Court of the Subordinate Judge of Purneah against the respondents as defendants. The 6th, 7th and 8th paragraphs of the plaint, which recited the above mentioned facts were as follows :—

"6. That the cause of action in this case accrued to the plaintiff from the 24th April 1899 aforesaid within the jurisdiction of this Court.

7. That for the purpose of jurisdiction, this suit is valued at Rs. 70,000, being the value of the properties advertised for sale as aforesaid.

8. That the plaintiff pays a court fee of Rs. 10, for her prayer for a declaration and another fee of Rs. 10 for her prayer for a permanent injunction."

The plaintiff claimed the following reliefs :—

"(a) That the plaintiff's title to and possession of the aforesaid properties be declared and that it be declared that the defendant 2nd party has no right or title left in the said properties after the sale to the plaintiff as aforesaid.

(b) That it be further declared that the said properties are not liable to be sold in execution of the decree of the defendant 1st party against the defendant 2nd party as aforesaid.

(c) That a permanent injunction may issue on the defendant 1st party not to execute his said decree against the said properties of the plaintiff.

(d) That the costs of the suit and interest be awarded to the plaintiff against defendant 1st party.

(e) That such further relief be granted to the plaintiff as the Court in the circumstances of the case may consider her entitled to."

Chhatrapat Singh did not defend the suit. Ghanshyam Misra filed a written statement in defence pleading *inter alia* that the plaint in the case was written upon paper insufficiently stamped.

Among the issues fixed by the Subordinate Judge was the following :—"Whether the plaint has been sufficiently stamped."

After the completion of the evidence on all the issues in the case the Subordinate Judge on August 27, 1900, delivered his judgment on the above issue only, holding that the suit did not

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fall within Art 17, Sch. II of the Court Fees Act (VII of 1870), but was one on which Court fees were payable, calculated on Rs. 62,022, the amount of the decree of Ghanshyam Misra, and on failure to pay a further sum of Rs. 1230 into Court by August 31, 1900, he made a decree dismissing the suit with costs. His judgment contained the following :—

“ The plaintiff's learned pleader contended that the object of the present suit is to have an unfavourable order made on a claim-case set aside and also for a declaration that defendant No. 2 has no subsisting interest in the disputed properties which might be put up to sale for the satisfaction of defendant No. 1's decree against him, and further that the title and possession in respect of the said properties are with her (plaintiff), that under Article 17, Schedule II of the Court Fees Act, the latter is bound to pay Rs. 10 stamp for each of those two prayers and as she paid Rs. 20 stamp, she has sufficiently complied with the requirements of the law, especially when she seeks a declaration of right and no consequential relief, and in support of this contention cited the following precedents :—

Chunia v. Ramdial (1), *Gulsari Mall v. Jadan Rai* (2), *Fatima Begam v. Sukhram* (3), *Dildar Fatima v. Narain Das* (4), *Gobind Nath Tiwary v. Gajraj Mati Taurayan* (5), *Kammathi v. Kunhamed* (6), *Dhondo Sakharam Kulkarni v. Gobind Babaji Kulkarni* (7), and *Vithal Krishna v. Bal Krishna Janerdan* (8).

A reference to these authorities reveals the fact that the three High Courts uniformly held that the Court Fees Act being a fiscal enactment its provisions must be so construed as to affect the litigants less heavily and acting upon this principle they unanimously held that in a suit instituted under section 283, Civil Procedure Code, the duty leviable should be that provided in Article 17, Schedule II and not *ad valorem* provided in Schedule I of the Court Fees Act. The 9 Bombay precedent went so far, as to hold that the same duty would be payable even when the plaint would contain a prayer for an award of possession. Against this array of authorities there are two precedents of the Calcutta High Court, *Ahmed Mirza Saheb v. A. Thomas* (9) and *Modhusudun Koer v. Rakhal Chunder Roy* (10). The former distinctly rules that in a suit of this nature, *ad valorem* duty should be leviable while the latter lays down that the duty should be charged

(1) (1877) I. L. R. 1 All. 360.

(2) (1878) I. L. R. 2 All. 63.

(3) (1884) I. L. R. 6 All. 341 and 466.

(4) (1889) I. L. R. 11 All. 365.

(5) (1891) I. L. R. 13 All. 389.

(6) (1891) I. L. R. 15 Mad. 288.

(7) (1884) I. L. R. 9 Bom. 20.

(8) (1886) I. L. R. 10 Bom. 610 F. B.

(9) (1886) I. L. R. 13 Calc. 162.

(10) (1887) I. L. R. 15 Calc. 104.

on the amount of the decree and not on the value of the property attached, unless the two amounts happen to be identical. None of these precedents it is true is a Full Bench one, but when they are in conflict with those of the other High Courts one of which is a Full Bench decision *Vithal Krishna v. Balkrishna Janardan* (1), I think, I am bound to follow the *dictum* of the High Court to which I am subordinate. Now it appears from the execution mohurir's note that the defendant No. 1's decree is now worth Rs. 62,022-11 and I must call upon the plaintiff to pay duty on this sum amounting to Rs. 1,250, but as she has already paid Rs. 20, she should now be required to pay Rs. 1,230 on or before the 31st current."

Against the said decree the appellant appealed to the High Court of Judicature at Fort William in Bengal, which dismissed the appeal with costs. The following is taken from the judgment of the High Court :—

"The Subordinate Judge has pointed out that in certain cases decided by the Allahabad, Madras and Bombay High Courts a suit of this kind has been held to be one coming under Article 17, Schedule II of the Court Fees Act, and therefore subject to a Court-fee duty of Rs. 10 only. He has, however, followed two rulings of this Court, *Ahmed Mirza Saheb v. A. Thomas* (2) and *Modhusudan Koer v. Rakhal Chunder Roy* (3) according to which a suit of this nature is one in which consequential relief is prayed for and therefore subject to an *ad valorem* Court-fee duty.

"The learned pleader who appears for the appellant has invited us to come to the conclusion that the above cited rulings of this Court are erroneous and to refer the question of the Court-fee duty payable on such a suit to a Full Bench with the view of having the decision in these two cases set aside. We do not see any necessity to adopt this course. The earlier of these two cases only followed a still older decision *Muftee Jela-loddin Mahomed v. Saharoolah* (4) so that the rule of this Court on the subject is one of very many years standing. Moreover, in this case the plaintiff seeks not only for a declaration of her right, but for the grant of a perpetual injunction restraining the sale, as the property of defendant No. 2, of the property she lays claim to. Hence, she would seem to us to seek for more than a declaratory decree and the suit comes within the purview of the Full Bench decision of the Allahabad High Court

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(1) (1886) I. L. R. 10 Bom. 610 F.B.

(3) (1888) I. L. R. 15 Calc. 104.

(2) (1886) I. L. R. 13 Calc. 162.

(4) (1874) 22 W. R. 422.

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in *Ram Prasad v. Sukh Dai* (1) which seems to have been overlooked in some at least of the later cases decided by the Allahabad High Court, which are cited in the Subordinate Judge's judgment."

The appellant, therefore, appealed to His Majesty in Council.

DeGruyther, for the appellant :—The appellant lodged an objection to the attachment under section 278 of the Civil Procedure Code (Act XIV of 1882), and applied for the removal thereof claiming the property as her own, but the Court made an order under section 281 of the same Code disallowing the appellant's claim. The present suit is brought under section 283 of that Code. High Courts in India are not in agreement on the question of the proper Court-fee payable on the plaint, when a suit is brought under section 283 of the Civil Procedure Code. The Bombay High Court has held that the plaint in such a suit is to be treated as falling under clause (i) of Article 17 of Schedule II of the Court Fees Act (VII of 1870) : *Dhondo Sakharam Kulkarni v. Govind Babaji Kulkarni* (2). The Allahabad High Court has held that such a suit need not be valued according to the value of the property, but could be brought on a stamp of Rs. 10 under Act VII of 1870, Schedule II, Article 17(iii) : *Chunia v. Ramdial* (3). The Calcutta High Court has held that as there is consequential relief claimed, it did not fall either under clause (i) or clause (iii) of Article 17 of Schedule II of the Court Fees Act, but that it fell under section 7 (iv) (c) of that Act and accordingly *ad valorem* duty prescribed under Schedule I of that Act was payable on the plaint : *Ahmed Mirza Saheb v. Thomas* (4).

[Lord Collins : You do not say in your plaint that the stamp of Rs. 10 is sufficient on the price of the relief which you claim ?]

DeGruyther : I am not under section 7 (iv) (c) at all. The question is whether consequential relief is claimed. If the answer is in the affirmative, the Court-fee already paid on the plaint is not sufficient ; but if the answer is in the negative, which, it is submitted is the case here, it is sufficient. When you ask for 'possession' of the movable or immovable property, you must pay *ad valorem* duty. But in this case no 'possession' is claimed.

[Lord Collins : Is not the value of the relief you claim the value of the burden or obligation you want to get rid of ?]

(1) (1880) I. L. R. 2 All. 720.

(3) (1877) I. L. R. 1 All. 360.

(2) (1884) I. L. R. 9 Bom. 20.

(4) (1886) I. L. R. 13 Cal. 161.

DeGruyther : This is a suit to set aside a summary order. Neither the case of *Muftee Jelaoodin Mahomed v. Shaharoollah* (1), nor the case of *Ahmed Mirza Saheb v. Thomas* (2), decides on what *ad valorem* duty is payable. The case of *Modhusudun Koer v. Rakhal Chunder Ray* (3) has no bearing on this point. The question there related to the jurisdiction of the Court. The present suit is a suit to set aside a summary order and the Court-fee of Rs. 10 already paid is sufficient under section 6 and Article 17 of Schedule II of the Court Fees Act. The decision in *Dhondo Sakharam Kulkarni v. Govind Babaji Kulkarni* (4) is right : see also *Vithal Krishna v. Balkrishna Janardhan* (5) ; *Govind Nath Tiwari v. Gajraj Mati Taurayan* (6). All that the appellant wants is to get rid of the attachment. Reference was also made to section 42 of the Specific Relief Act (I of 1877) and *Kathama v. Dora Singa Tever* (7).

The respondents did not appear.

The judgments of their Lordships was delivered by

Lord Robertson.—The sole question in this appeal is what is the proper Court fee payable on the plaint in the suit. The Act governing the question is the Court Fees Act (VII of 1870). Proceeding on the theory that what was due was Rs. 20, the appellant stamped her plaint accordingly ; her suit was dismissed in the Court of first instance on the ground that her plaint was insufficiently stamped ; and this judgment was affirmed by the High Court of Bengal in the judgment now appealed against. The present appeal has been heard *ex parte*.

For the right determination of the question at issue it is necessary to ascertain what are the object and the nature of the suit. Now, fortunately, this is not dubious. The plaintiff succinctly and accurately states that the cause of action accrued on 24th April 1899, that being the date of a judgment pronounced against her in the Court of the Subordinate Judge of Purneah in certain execution proceedings. What had taken her into that Court was this : she had bought a property from the second respondent and had taken possession and was registered as proprietor. After and notwithstanding this, the first respondent, purporting to be a creditor of the second respondent, under a decree for Rs. 62,022 attached the property and advertised it for sale. The appellant lodged with the Subordinate Judge of

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(1) (1874) 22 W. R. 423.

(4) (1884) I. L. R. 9 Bom. 20.

(2) (1883) I. L. R. 13 Calc. 162.

(5) (1886) I. L. R. 10 Bom. 610.

(3) (1877) I. L. R. 15 Calc. 104.

(6) (1891) I. L. R. 13 All. 389.

(7) (1895) L. R. 2 I. A. 169.

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Purneah, before whom the execution proceedings took place, a claim to the property, claiming that her right should be declared and that an injunction should issue against the execution of the decree held by the first respondent. This claim was rejected by the Subordinate Judge on 24th April 1899, and his decree is the cause of action in the suit which gives rise to this appeal.

Now the right of the appellant to sue for the establishment of her right, which the Subordinate Judge had negatived, rests on the 283rd section of the Civil Procedure Code (XIV of 1882).

"The party against whom an order under section 280, 281, or 282 is passed may institute a suit to establish the right which he claims to the property in dispute ; but, subject to the result of such suit, if any, the order shall be conclusive."

This is clear of itself, and the High Court, in the judgment appealed against, describes the suit as "of the nature referred to in section 283."

Having thus ascertained what is the nature of the suit, their Lordships turn to the Court Fees Act to see whether such actions of appeal are specifically dealt with ; for it is only if they are not specifically dealt with that the task arises of finding to which group of cases this is to be assigned. Now, the 17th Article of Schedule II is expressly made to apply to "Plaint or memorandum of appeal in each of the following suits."

"1. To alter or set aside a summary decision or order of any of the Civil Courts not established by Letters Patent, or of any Revenue Court."

Now this is an exact description of the effect of the appellant's suit. It is true that, instead of asking the Court to alter or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge, and which the Subordinate Judge had refused. But this is merely a verbal or formal difference, and section 283 of the Civil Procedure Code, under which section the action is brought, recognizes such a suit as not merely an appropriate, but the only mode of obtaining review in such cases.

Their Lordships are accordingly of opinion that the first head of Article 17 of Schedule II applies to the case. This view is opposed not only to that of the respondents and of the High Court, but to that of the appellant. Misled by the form of the action directed by section 283 both parties have treated the action as it were not simply a form of appeal, but as if it were unrelated to any decree forming the cause of action. Accordingly,

on the one hand, the appellant, pointing to her prayer for a declaration, says she pays Rs. 10 on that, and, pointing to her prayer for injunction, says she pays other Rs. 10 on that. In their Lordships' judgment, this is not the proper view of the suit taken as a whole ; but if it were, it would be extremely difficult for the appellant to bring her suit, which asks consequential relief as well as a declaratory decree, within the enactment which she invokes.

On the other hand, the respondents equally ignore the essential fact that this is a plaint for review of a summary decision ; and they go on to bring the action, treated as an original action, within the class of cases where the Court fees are *ad valorem* of the action. It is not necessary to discuss this in detail, but their Lordships are not satisfied that, even if the value of the action determined the fee, the respondents have rightly ascertained the value. What they have done is simply to take the sum in the execution decree. This is plainly a fallacious proceeding. The value of the action must mean the value to the plaintiff. But the value of the property might quite well be Rs. 1,000, while the execution debt was Rs. 10,000. It is only if the execution debt is less than the value of the property that its amount affects the value of the suit.

Their Lordships, however, are satisfied that there is in the Statute no general or overriding reference to value. The terms of sub-section 1 of Article 17 (which they hold to apply) contains no reference to value. In like manner the class of suits dealing with arbitration awards is coupled with suits such as that immediately in question ; awards may be of value Rs. 10 or of value Rs. 100,000, and yet no distinction is made. In short, the Statute, for good reasons or bad, has dealt with certain actions irrespective of value ; and the present action is one of them.

This being a matter of practice, although to be determined by Statute, their Lordships would willingly have given much weight to any consentaneous practice. But while the respondents can claim to be supported by decisions of the Calcutta and Allahabad High Courts, there is a contrary decision in the Bombay High Court *Dhondo Sakharam Kulkarni v. Govind Babaji Kulkarni* (1) which has the high authority of Sir Charles Sargent, whose judgment is in accordance with the conclusion at which their Lordships have arrived.

It is a singular fact that while the *ratio* of the appellant's

(1) (1884) I. L. R. 9 Bom. 20.

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case is at variance with that which their Lordships adopt, there is only a difference of Rs. 10 in the practical result, the appellant having maintained that she was liable for Rs. 20, while she was truly liable only for Rs. 10. On the other hand, the sum held due in India was Rs. 1,320, and this was the result of the *ad valorem* theory. It is to be observed that the appellant did not, as she should have done, stand on the first clause of the 17th Article of Schedule II, but, on the contrary, contributed to mislead the Courts, by advancing a theory which was as unsound as that of the respondents. Their Lordships think that, in these circumstances, the justice of the case is met by the first respondent (who alone appeared in the suit) paying half of the appellant's costs in the High Court and in England.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed, that the decrees of the High Court and the Court of the Subordinate Judge ought to be discharged, that the case ought to be remitted to the High Court with a view to the necessary steps being taken to dispose of the remaining issues reserved by the Subordinate Judge for future consideration, that the first respondent ought to pay half the appellant's costs in the High Court, and that the costs in the Court of the Subordinate Judge ought to be dealt with by the Subordinate Judge after the other issues have been disposed of.

The first respondent will pay half the appellant's costs of this appeal.

Appellant's Solicitor *C. G. Farr*.

The respondents did not appear.

Appeal allowed.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

MUSSUMMAT WALIHAN AND OTHERS

v.

JOGESHWAR NARAYAN AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT
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Practice—Suit for possession—Failure of cause of action—Proper decree to be made in such a case—Possibility of media concludendi being the same in other actions gives the Court no power to pronounce upon them.

Where the plaintiffs claimed to have possession of their mother's property on the ground that she was dead and the Court held that it was not proved that the lady was dead, the inevitable inference would seem to be that the suit

should be dismissed. The mere circumstance that some of the *media conciliandi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action.

Appeal from a decree of the above-mentioned High Court (June 25, 1903) affirming a decree of the Court of the Subordinate Judge of Bankipur (March 31, 1900).

The question for the decision of their Lordships was whether the Courts in India were right in making the decree which they passed in view of the reliefs claimed by the respondents in their plaint.

One Gopi Nath was the owner of a village called Dhawlpur Akowna. He died on November 28, 1859 leaving him surviving a widow, Gend Koer, and a daughter, Kewal Koer, who subsequently married a man named Chandan Lal. On the death of Gopi Nath his widow succeeded him and remained in possession of the estate till her death on December 2, 1868, when she was succeeded by Kewal Koer.

On July 2, 1868, Gend Koer borrowed the sum of Rs. 2,000 from one Wahid Ali (since deceased and now represented by the appellants) on a mortgage of the said village, and on June 25, 1868, obtained another advance of Rs. 3,000 from him.

After the death of Gend Koer on December 2, 1868, her daughter Kewal Koer had further monetary transactions with Wahid Ali.

On April 3, 1869, she borrowed the sum of Rs. 2,000.

On July 6, 1870, she executed a deed for Rs. 5,000 on account of the amount due on the said deed of April 3, 1869, and on account of another advance.

She, then, executed a consolidated deed for Rs. 22,000 on June, 25, 1872, which sum included a small balance due under the deeds executed by Gend Koer, the amount due under the deeds executed by herself and a fresh loan of over Rs. 13,000. She further borrowed Rs. 5,500 on February 17, 1873 and Rs. 2,000 on September 2, 1873.

Eventually on April 23, 1875, she executed a consolidated deed, in which all the previous transactions were included, for a sum of Rs. 30,000 in favour of Zahur Ulhuq, son of Wahid Ali, who died prior to the present suit.

On failure to pay the amount due by Kewal Koer, the mortgagee Zahur Ulhuq put the deed in suit and on January 28, 1878 obtained a decree thereon from the Court of the Subordinate Judge of Patna. In execution of the said decree the said

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village was sold and purchased on August 26, 1878 by Zahur Ulhuq, who obtained possession of the same.

On September 14, 1897 the present suit was instituted in the Court of the Subordinate Judge of Patna. The plaintiffs were Jogeshwar Narayan and Kusheswar Narayan, sons of Kewal Koer. The defendants were the appellants, the heirs of the mortgagee and purchaser Zahur Ulhuq. The plaint set out that the said village was the property of Gopi Nath, that on his death Gend Koer succeeded to a Hindoo widow's estate, and that on her death Kewal Koer also succeeded to an estate for life. The plaintiffs alleged that the cause of action arose on February 10, 1897, the date of the death of their mother Kewal Koer and that they, as her sons, were on her death entitled to succeed to the estate of Gopi Nath. The plaintiffs challenged the validity of the mortgages executed by Gend Koer and Kewal Koer, and the sale in pursuance thereof as binding on them. For relief they prayed :—

"(a) That on adjudication of the plaintiff's title to the properties described in the plaint possession be allowed to them.

(b) That mesne profits from the date of suit till delivery of possession be awarded.

(c) That costs with interest be awarded.

(d) That any other relief, which the Court may think proper under the circumstances of the case may be granted to the plaintiffs."

The appellants by their written statement denied that Kewal Koer was dead. They also denied that the plaintiffs were the sons of Kewal Koer and pleaded that the transactions with Gend Koer and Kewal Koer were binding on the plaintiffs.

On the pleadings the Subordinate Judge fixed the following issues :—

(1) Was Kewal Koer dead ?

(2) Were the plaintiffs the sons of Kewal Koer ?

(3) According to the law as laid down in the Mitakshara, did Kewal Koer obtain absolute right in the properties which devolved on her as heir after the death of her mother Gend Koer ? If so, were the plaintiffs precluded from suing ?

(4) Were the sums mentioned in the bonds not fully paid ?

(5) Were debts, or any and what portion of them, incurred on account of legal necessities by the widows (or more precisely by the widow and the daughter) ?

The decision of the Subordinate Judge on those issues was

that the alleged death of Kewal Koer was not proved, that the plaintiffs were the sons of Kewal Koer, that Kewal Koer's estate was limited, that moneys had been paid to Gend Koer and Kewal Koer, and that the transactions were not justified by legal necessity so as to be binding on the plaintiffs. On these findings he made a decree in the terms following :—

“ Ordered that this suit be dismissed and it be declared that the plaintiffs are sons of Mussummat Kewal Koer, and that the disputed properties in claim were not sold for valid expenses. The plaintiffs do recover $\frac{1}{4}$ ths of their costs from the contending defendants and the said defendants do recover $\frac{1}{4}$ ths of their costs from the plaintiffs. The decretal amount shall carry interest at 6 per cent. per annum till realization.”

Against the said decree both parties appealed to the High Court of Judicature at Fort William in Bengal, which disposed of both appeals by one judgment affirming the findings of fact and law come to by the Subordinate Judge and dismissing both with costs. The judgment (by Ghose and Pratt JJ.) contained the following :—

“ We thus conclude that Kewal Koer did not die as alleged. That being so, the plaintiffs' suit for possession is premature. The Lower Court has, however, given a declaratory decree as to plaintiffs' sonship, and that the properties were sold without legal necessity.

“ It was contended by Mr. Hill for the defendants that the suit could not be maintained, the cause of action upon which it was founded, *viz.*, the death of Kewal Koer, having failed. No doubt the suit, so far as it asked that a decree for possession be awarded to the plaintiffs, must fail, as Kewal Koer is not proved to be dead, but the suit practically sought for two declarations, *viz.*, that the plaintiffs are grandsons of Gopi Nath, and that they are not bound by the sales held in execution of the decree against their mother, the loans upon which the decree was obtained not having been for legal necessity. And issues Nos. 2 and 5 involving these questions were raised between the parties in the Court below, and were decided. In these circumstances, it is not desirable that the final decision of these questions should be postponed till after the death of Kewal Koer, when much of the evidence which is now forthcoming, and which was adduced at the trial will have disappeared. The Subordinate Judge has clearly shown how matters really stood.”

Against that decree of the High Court made on the appellants' appeal to that Court, the appellants appealed to His majesty in Council.

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Mr. DeGruyther and Mr. G. A. H. Branson, for the appellants:—
The suit is for possession and the cause of action is the death of the respondents' mother. Both Courts in India have held that it was not proved that the lady was dead. Consequently there being no cause of action, the suit ought to have been dismissed. The Courts below were wrong in making declaratory decree such as they have passed. The Courts had no power to make such a declaration, which is inconsistent with the relief sought in the suit itself. It might be suggested, the plaint could be amended. But it must be amended before judgment: sec. 53 (c) of the Civil Procedure Code (Act XIV of 1882). That section is the only section that deals with amendments of plaints. The effect of the amendment would be to make a suit in character different from and inconsistent with the original suit. Such an amendment could not be made under the abovementioned section: *Mussamut Doolhun Yankee Koer v. Lall Beharee Roy* and others (1). On failure of the right for possession the suit ought to have been dismissed: *Rani Rajessuree Koonwar* and others v. *Maharanee Indurjeet Koonwar* and others (2).

The Respondents did not appear.

The judgment of their Lordships was delivered by

November 20.

Lord Robertson.—Their Lordships are of opinion that this action ought to have been dismissed with costs, and that therefore this appeal should be allowed.

The suit was one of the simplest and most plainsailing character, alike in the ground of action and the decree sought. The plaintiffs (the present respondents) claimed to have possession of their mother's property on the ground that she was dead. The Courts held that it was not proved that the lady had died (and indeed there was positive evidence that she was alive). The inevitable inference would seem to be that the suit should be dismissed. The Court which tried the case, however, had, very naturally, tried the whole case, at once and had to deal with some questions as to the paternity of the plaintiffs, and also as to the validity of certain gifts by the mother. These however, were merely argumentative steps towards the only decree sought, *vis.*, possession; they were not presented by the plaintiffs as separate and substantive questions affecting rights other than that of possession of their (alleged) deceased mother's estate. As regards one of those questions, it is plain that the validity of the gifts,

(1) (1872) 19 W. R. 33.

(2) (1868) 6 W. R. 1.

the lady being alive, could only be determined with her as a party to the suit. Again, the Court might quite well have first tried the issue whether the mother was dead and, reaching as it did, the conclusion that this essential fact was not proved, it is impossible to suggest that it could then have gone on to take up and try the other questions. Yet the present is really the same question. It appears to their Lordships that the circumstances that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. It is not surprising that no proposal was made in India to amend the record, and the record presents its original plain simplicity.

Their Lordships will therefore humbly advise His Majesty that the appeal ought to be allowed, that the decrees in both Courts below ought to be discharged and that instead thereof the suit ought to be dismissed with costs in both Courts to be paid by the respondents.

The respondents will pay the costs of the appeal.

Appellants' Solicitors : *Watkins and Lempriere*.

The respondents did not appear.

Appeal allowed.

CRIMINAL REVISION.

Before Mr. Justice Caspersz and Mr. Justice Chitty.

APURBA KRISHNA BOSE

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EMPEROR.*

Indian Penal Code (Act XLV of 1860), Sec. 124A—Criminal Procedure Code (Act V of 1898), Sec. 196—Complaint—Sanction—Examination of Complainant—Local Government—Presumption—Evidence Act (I of 1872), Sec. 114—Privilege—Proceedings of Court of Justice—Printing Presses and Newspapers Act (XXV of 1867), Sec. 7—Declaration by Printer—Liability of Printer.

Section 196 of the Criminal Procedure Code requires that no case under section 124A of the Indian Penal Code shall be taken cognizance of except upon complaint made with the authority of the Local Government. Where the letter of authority did not specify the name of the accused but he was indicated from

* Criminal Rule No. 1176 of 1907 against the order of the Chief Presidency Magistrate, Calcutta, dated 23rd September 1907.

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the first and his name was supplied at the commencement of the Police Court proceedings, *held* it was a sufficient compliance with the section.

The person who signs the letter of authority is not the complainant and it is not necessary to take his examination under the law. The person who armed with the authority makes the application to the Court for the apprehension of the accused is the complainant and his examination is to be taken. A Presidency Magistrate need not at this stage administer an oath to the complainant nor reduce his complaint into writing.

The authority under section 196 need not in the case of 'Local Government' be signed personally by the Lieutenant-Governor, it is enough if it is signed by one of his accredited and Gazetted Officers.

It must be presumed that all official acts have been duly performed and section 114 of the Evidence Act amply supplies all omissions in the method of communication of the sanction to the prosecuting officer and the Magistrate, where the sanctions as they originally stood contained a misdescription of the articles on which the prosecution was based and this was rectified by a subsequent sanction filed in course of the trial, *held* the petitioner was not prejudiced and the defect was cured by section 537 of the Criminal Procedure Code.

A newspaper was prosecuted for sedition. One article only was put in at the trial. The prosecution intended to rely upon other articles also in support of their case and had them translated and the translations supplied to the accused in that case. They were, however, never brought upon the record in that case. Where these translations were reprinted by another newspaper, *held* that the republication was not of any proceedings of a Court of Justice and not, therefore, privileged. In a case like this, the Court shall look into the state of the country and judge whether the republication was *bonafide* or not.

The person who subscribes to the declaration under the Printing Presses and Newspapers Act must be presumed under section 7 to be cognizant of all that he was printing and publishing and in the absence of any evidence to the contrary, his liability in the matter cannot be gainsaid.

Rule obtained by the Petitioner to show cause why his conviction for sedition and sentence of three months' rigorous imprisonment should not be set aside.

The material facts and arguments appear from the judgment.

Mr. A. N. Chaudhuri and Babus Manmatha Nath Mukherji and Narendra Kumar Basu for the Petitioner.

Mr. J. Bagram for the Crown.

C. A. V.

November, 12.

The judgment of the Court was delivered by

Caspersz J.—This is a rule calling on the Chief Presidency Magistrate, Calcutta, to show cause why the conviction and sentence passed on the petitioner should not be set aside. The learned Judges who granted the rule did not restrict its operation in any way; we are, therefore, in a position to deal with all the grounds upon which the petitioner based his application; and, in view both of the importance and the connection, one with

another of the questions raised for our consideration, the course adopted has been the most convenient one.

The petitioner, Apurba Krishna Bose was the printer of a daily newspaper called *Bande Mataram* published in Calcutta, and he was recorded as such under the provisions of the Printing Presses and Newspapers Act XXV of 1867. He was arrested on a warrant issued by the Chief Presidency Magistrate on the "allegation" that he had committed the offence of sedition punishable by section 124A, Indian Penal Code. The following paragraphs of the application recite the facts which are not in controversy :—"That your petitioner was put upon his trial before the Chief Presidency Magistrate of Calcutta, along with the alleged Editor and the Manager of the Paper, for having published in the Town edition of the 27th June 1907, and its corresponding Dak edition, of the *Bande Mataram* a letter headed "Politics for Indian," and a copy of the official Translator's translation of the articles for which the Editor of *Jugantar* a Weekly paper had been found guilty of sedition and convicted under section 124A."

"That at the trial three notes purporting to be signed by the Chief Secretary to the Government of Bengal were put in, so far as regards your petitioner, as the sanction for his prosecution. True copies of these are herewith attached and marked A, B and C."

"That evidence was gone into and eventually, on the 23rd September 1907, the learned Chief Presidency Magistrate delivered his judgment acquitting the alleged Editor and the Manager but convicting your petitioner under section 124A, Indian Penal Code, and sentencing him to undergo rigorous imprisonment for three months."

The further particular, so far as they need be mentioned, and as we gather them from the record, are these. The earlier sanctions of the Government of Bengal, bearing date the 6th August 1907, were filed in the Court of the Chief Presidency Magistrate on the 17th idem by Superintendent Ellis of the Detective Department, who applied for a warrant of arrest, against the Printer by name Apurba Krishna Bose of the *Bande Mataram*, on a two-fold charge of sedition namely, for printing an article headed 'India for the Indians,' and for reprinting certain seditious articles which originally appeared in another newspaper called the *Jugantar*, and in respect of one of which articles the Editor of the *Jugantar* had been already convicted.

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In pursuance of the warrant issued, the petitioner was arrested on the 21st August, and the trial begun on the 26th. The accused were charged on the 4th September, and the petitioner was convicted on the 23rd. Meanwhile, on the 26th August, the description of the article 'India for the Indians' had been corrected to 'Politics for Indians' by means of a third sanction of the Government of Bengal filed on that date. All the sanctions were forwarded through the Commissioner of Police, Calcutta, for whose "information and guidance" they were sent by Mr. E. A. Gait, Officiating Chief Secretary to the Government of Bengal, the Officer who had signed the sanctions. The wording of these three sanctions is :—"The sanction of Government is hereby accorded to the prosecution under section 124A of the Indian Penal Code of the.....Printer.....of the *Bande Mataram* newspaper," (and so forth). No name was inserted in any of the sanctions, but this omission was supplied by Superintendent Ellis in his application for warrants dated the 17th August. In his deposition given on the 26th August Superintendent Ellis said :—"This shewn to me is the body warrant for arrest of accused Apurba. On 18th August I endorsed it for execution to Inspector Lahiri. Applications for both these warrants was made after receipt of sanction and on or about the 17th August." The Superintendent had previously said that he had received the sanctions signed by the Chief Secretary to the Government of Bengal. He, also, stated in cross examination :—"I am in charge of this case, I am under the directions of the Commissioner of Police. I received verbal instructions from the Commissioner of Police, but no written instructions. I obtained a body warrant. The application for warrant contained no statements nor did I make any verbal statement on oath. I proceeded against Apurba on the basis of the declaration made by him. I knew of that declaration when I applied for warrant. I believe, however, that there was some additional evidence known to the Police."

On these facts the learned counsel for the petitioner has advanced ten contentions with which we shall deal seriatim.

It is first urged that the trial of the petitioner was wholly bad as there was no proper sanction for his prosecution as required by section 196, Code of Criminal Procedure.

Section 196 of the Code enacts that "no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code (except section 126) or punishable under

section 108A, or section 153A, or section 294A, or section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor-General in Council in this behalf." The section does not use the word *sanction*. It contemplates a complaint made by order of, or under authority from, the Local Government. The Code differentiates between sanctions and complaints as, for example, in section 195. The so called sanctions signed by Mr. Gait were not expressed in exact language; but we do not think that the prosecution of the petitioner was bad for want of proper sanction. He was duly proceeded against if the provisions of section 196 were substantially complied with.

The section was construed by the Bombay High Court in *Queen-Empress v. Bal Gangadhar Tilak* (1), In that case the sanction (to use the convenient word) was expressed in general terms, and did not even specify the seditious articles. Nevertheless, the Court held that "the effect of no such specification being made is to give him (complainant) the widest latitude in selecting the matter to be complained of." We entirely agree with Strachey J. that orders under section 196 should be expressed with sufficient particularity and, we may add, with stricter adherence to the language of the section. But, the real question in such a case is whether the prosecution was instituted under the authority of Government. To quote the judgment of the Full Bench. "There is no special mode laid down in the Code whereby the order or sanction of Government is to be conveyed to the officer who puts the law in motion. In this case the prosecution was conducted by the Government Solicitor. It was instituted by the Oriental Translator to Government, and he produced the written order of Government to institute the complaint." The prosecution of the petitioner was, *mutatis mutandis*, even more regular than the prosecution of Tilak.

But the learned counsel has called our attention to a decision of Pratt and Handley JJ., in the case of *Kali Kinkar Sett v. Nriya Gopal Roy* (2), where a Division Bench of this Court ruled that a Presidency Magistrate is not exempted by section 200, clause (b), Code of Criminal Procedure from the necessity of placing on record the necessary evidence of the actual complainant's authority as delegated by the person to whom sanction was actually granted to prosecute certain persons under section 193,

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(1) (1897) I. L. R. 22 Bom. 112.

(2) (1904) I. L. R. 32 Calc. 469.

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Indian Penal Code. We think that case is clearly distinguishable from the present, because in the absence of proof of delegation the actual complainant had no *locus standi*; and his complaint might have been negatived by real complainant coming forward and exercising his own discretion not to proceed in the matter. No such considerations can affect the present case. We may notice, in this connection, the English case of *Reg v. Fudd* (1). The learned counsel has urged, on the authority of the observations of Lord Coleridge C.J., that the petitioner's name should have been mentioned and specified by Government, and that the *fiat*, or order, or sanction, initiating his prosecution being defective, in that it merely described him as the printer of the *Bande Mataram*, the conviction of the petitioner should be quashed. We think it sufficient to say that *Reg v. Fudd* (1) proceeded on a construction of the English Newspaper Libel Act, and that the law we administer in this country is contained in the Code of Criminal Procedure. We have to construe section 196 of that Code the terms of which are very different from the English Statute. The petitioner here was indicated from the first; his name was supplied when it was required, *i.e.* at the commencement of the Police Court proceedings.

The next contention is that the sanctions or notes by Mr. Gait were not really complaints within the meaning of section 4 (h) of the Code. With this we entirely agree, the sanctions were the order, or authority, by which the prosecution was started. The complaint, if any, was made by Superintendent Ellis. The definition of complaint is—"the allegation made orally or in writing to a Magistrate with a view to his taking action." Now, the petitioner himself has admitted in the second paragraph of his application that he was arrested "on the *allegation* that he had committed an offence under section 124A, Indian Penal Code." The facts which we have recited in the earlier part of this judgment can bear no other construction than that Superintendent Ellis made oral allegations against the petitioner. It was not necessary that those allegations should be on oath, or that they should be reduced to writing. We desire to affirm the rule laid down in *Queen Empress v. Sham Lall*, (2), where an application by a complainant, to have his witnesses summoned and the case tried, was regarded as a complaint. The same rule has been followed in later decisions of this Court. We, therefore, think that the application of Superintendent Ellis, coupled with

(1) (1888) 87 W. Rep. (Eng.) 148.

(2) (1887) I. L. B. 14 Calc. 707.

his oral allegations, though the latter were not on oath, nor reduced to writing, amounted to a complaint within the meaning of section 196.

It was argued that because there is no record of Superintendent Ellis' examination, he must be taken to have not been examined. It is, however, clear, from the proceedings and Superintendent Ellis' subsequent examination in Court, that he was examined by the Magistrate at the time that he applied for the warrants, though that examination was not upon oath.

In this connection, we should notice a subsidiary argument of the learned Counsel. He urges that the sanction of Government was a sanction given in the abstract which to use the words of Pigot and Hill JJ. in *Baperam Surma v. Gouri Nath Dutt* (1) "may float about the world like a bit of thistle down until it comes in contact with some possible prosecutor." But, can it be said that Mr. Gait dispersed these sanctions in empty air and that Superintendent Ellis intercepted them and used them for prosecuting the printer of the *Bande Mataram*? Can it be said that the Commissioner of Police and the standing counsel to the Government of India abetted an unwarrantable and illegal action on the part of Superintendent Ellis? We think not. It must be presumed that all official acts have been regularly performed; and the presumption of section 114 of the Indian Evidence Act amply supplies any omission either as to the method of communication of the sanction to Superintendent Ellis, or in the order-sheet of the Chief Presidency Magistrate. Moreover, the facts stated by the petitioner in his own application clearly indicate that he was put upon his trial in consequence of the sanctions granted by Government.

There is another subsidiary contention on this part of the case, and that is that the Lieutenant-Governor should have personally signed the sanction under section 196. The contention appears to us puerile. Although the expression of Local Government means the Lieutenant-Governor, the head of the executive Government must necessarily, and ordinarily does, act and communicate his orders through his accredited and gazetted officers.

It is contended, *thirdly*, that even if Mr. Gait's notes or sanctions be held to be complaints, the Magistrate should have examined the complainant (Mr. Gait or Superintendent Ellis) as required by law before issuing process against the petitioner.

(1) (1892) I. L. R. 20 Calc. 474.

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The argument must fail by reason of the observations we have already made; we do not regard these sanctions as complaints, they merely authorized Superintendent Ellis to make the complaint which we have found that he did make.

The *fourth* contention is:—that Exhibits 3 and 4 were wrongly considered to be supplementary complaints, and that the petitioner could not be properly tried on them after they had been placed before the Court. This contention refers to the correction of the name of the article headed 'Politics for Indians.' The first citation of the article, *viz.*, 'India for the Indians' was merely a mis-description. There was no such article in the *Bande Mataram* of the date indicated, but there was an article, or letter, headed 'Politics for Indians,' and the trial commenced, proceeded, and ended, in respect of that article. The petitioner was in no way prejudiced, as he knew what case he had to meet. The defect, if any, is cured by the provisions of section 537, Code of Criminal Procedure.

The next ground taken is that the Magistrate acted illegally in proceeding with the trial of the petitioner when he found that there was no authority for proceeding with the trial. As to this, we do not desire to add anything to what we have already said, because, in our opinion, there was no real irregularity depriving the Chief Presidency Magistrate of his jurisdiction over the petitioner.

We pass now to a consideration of the sixth plea: That the article 'Politics for Indians' is not in any way seditious. We have read that article with attention and, we may say, with indulgence and we find it impossible to regard it otherwise than as seditious. The definition of sedition given in section 124A, Indian Penal Code, contemplates *hatred*, or *contempt* or disaffection towards His Majesty or the Government established by law in British India, and this apart from any intention of the offender. The article is in the form of an unsigned letter, but it does not appear in the correspondence columns. There is no heading that the Editor does not accept responsibility for the opinions expressed in the letter. The comments in the letter are incompatible with the continuance of the Government established by law. Reading the article, as we have read it, for the first time, we think the comments on the slave trade, the evil genii, and the alternatives of British goods or the sword, and the reference to His Majesty the King-Emperor, and the tone generally, of the production, are not within

the explanation to section 124A. Such writings are calculated to bring Government into hatred and contempt. It may be said that these are words of emotional exaggeration. It may be said that 'Politics for Indians' was based on imperfect telegraphic intelligence. But the duty of every citizen is to support the Government established by law, and to express with moderation any disapprobation he may feel of the acts and measures of that Government. If the article were near the line demarcating legitimate comment from seditious utterance, we might feel disposed to give the petitioner the benefit of the doubt, but, in our opinion, no such reasonable doubt exists.

The seventh contention refers to the reprinting of the official translations of the———*Jugantar* articles, and it is urged that the republication was one made *bonafide* of the proceedings of a Court of Justice. The protection afforded by the fourth exception to section 499, Indian Penal Code, is invoked. That exception provides that it is not defamation to publish a substantially true report of the proceedings of a Court of Justice. But did the *Jugantar* articles form part of the proceedings of a Court of Justice? They did not. The conviction for sedition in the *Jugantar* case was based on one article only. The prosecution intended to rely in support of their case upon other articles published in that paper. These other articles were translated and communicated to the accused for his sole benefit. They were however, never used, and never were brought upon, or form part of, the record in the *Jugantar* case. There was, therefore, no excuse for the wholesale publication in the *Bande Mataram* of these translations, and the head note is inaccurate and misleading. The publication cannot therefore, be justified on the ground put forward by the petitioner. It was not, indeed it could not be, contended that these articles were not seditious. In a question of this kind we have to take into consideration the state of the country and the object with which the republication was made. It is admitted that the country was, at the time in a state of unrest. That being so, it was mischievous to add fuel to the flame of disquiet. There is no reason to believe, and we have not been told, that the *Jugantar* articles were communicated to the readers of *Bande Mataram* for any useful or proper purpose. The communication of seditious articles to another, and possibly larger, and certainly more educated class of readers, tended to increase and continue the mischief which had been checked by the criminal prosecution of the *Jugantar*. The

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dissemination of temptation is not excusable on any principle with which we are conversant.

The eighth contention is that the petitioner is imperfectly acquainted with the English language, and that he merely acted under orders. We shall consider this matter when we come to the question of sentence.

Ninthly, it is argued that the petitioner merely subscribed to the declaration required by the Printing Presses and Newspaper Act, XXV of 1867, and that, in the absence of evidence to show that he was cognizant of what he was printing and publishing, he cannot be liable for the publication of the *Bande Mataram*. This contention cannot prevail in view of the legal presumption embodied in section 7 of the Act, and in the absence of any evidence to the contrary. The learned Counsel has called our attention to the diversity of the provision contained in Act XXV of 1867, and we are disposed to agree with him that 40 years ago it was never anticipated that a mere printer would be punished, with the aid of the Act, for the publication of seditious matter. It is unfortunate that the person or persons really responsible for these seditious utterances remain undetected. But our duty is to apply the law. It may be observed that if, in consequence of the part of printer being found to be a dangerous or invidious one, the real authors of sedition are unable to get their writings printed, the present law will indirectly succeed in checking sedition, though it is evident that if the law cannot also reach the more guilty persons, it should be, and we have little doubt that it will be, amended.

Lastly, on the question of sentence we pointed out to Mr. Chowdhury that section 124A provides the punishment of transportation for life or imprisonment for three years with fine. We agree with him that the petitioner should not be severely punished, but we cannot regard a sentence of three months imprisonment as other than lenient. To reduce it any further would destroy the responsibility and the salutary dread of punishment which should be inculcated.

The Rule is discharged.

N. K. B.

Rule discharged.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Francis William Maclean, K.C.I.E., Chief Justice,
Mr. Justice Harington and Mr. Justice Fletcher.

LAKHAN CHANDRA SEN AND OTHERS

v.

MADHU SUDAN SEN AND OTHERS.*

Limitation Act (XV of 1877), Section 14—Period during which right to sue is suspended, whether allowable :

An issue was raised between co-defendants in a suit. One of them got judgment in his favour, which however was reversed on appeal. Then the unsuccessful respondent filed a suit against the successful appellant :

Held, that the plaintiff is entitled to deduct the period during which there was a judgment of the lower Court in his favour.

Mussummat Ranee Sarno Moyee v. Shoooshee Mokhee Burmonia (1), *Pran-nath Roy Chowdry v. Rookea Begum* (2) followed.

Courts of justice ought to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought.

The facts of the case are as follows :

In 1896, C instituted a suit against A and R for declaration of their share in certain property and for possession &c. C and A had the same kind of interest which however was adverse to that of R. An issue was raised at the instance of R as to whether A was entitled to a third share in the property. The judgment in that suit was delivered by Mr. Justice Henderson on the 20th April 1903. It was then declared among other things that A was entitled to a third and possession was ordered to be given. From this judgment R appealed, and the appeal was decreed on the 22nd February 1904 in so far as the interest of A was concerned. Thereupon A instituted the present suit for the same relief against R and others. The lower Court held that the suit was barred by limitation. It was conceded however that if the period between the 20th April 1903 to the 22nd February 1904 be taken out, the suit would be within time. From this judgment A appealed.

Mr. Garth (with him *Mr. S. R. Das*) for the Appellants—We are entitled to take out the period between the judgments of the lower Court and of the appellate Court in the Original Suit of 1896. When

* Appeal No. 1 of 1907, from the judgment of Bodilly J.

(1) (1868) 12 M. I. A. 244.

(2) (1859) 7 M. I. A. 323 (357).

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the judgment of the lower Court in that case was pronounced, we had a decree which we could execute. Our claim was satisfied. We could not have brought the present suit during that period. Further, in view of the judgment of the Appeal Court, we say we were *bonafide* prosecuting the suit in a Court which has no jurisdiction. Even a defendant may prosecute a suit. In that case the said period should be allowed (section 14 of the Limitation Act). Cited *Mussummat Ranee Sarno Moyee v. Shooshee Mokhee Burmonia* (1), *Dindayal Pramanik v. Radha Kishori Debi* (2), *Bassu Kuar v. Dhum Singh* (3), *Prannath Roy Chowdry v. Rookea Begum* (4), *Surjitram Marwari v. Barhamdeo Parshad* (5).]

Mr. S. P. Sinha (with him Messrs. B. C. Mitter and C. R. Das) for the Respondents—Section 14 of the Limitation Act does not apply. Specific pleading is necessary to show that the section applies. Cited *Jogeshwar Roy v. Rqj Narain Mitter* (6).

The cases cited all depend on the fact that in each case a *new* obligation begins on account of the reversal of the judgment of the lower Court.

C. A. V.

The judgment of the Court was delivered by

Maclean C. J.—The only question we have to deal with on this appeal is whether the suit is barred by limitation. The facts of the case, so far as are material, are as follows. It appears that in the year 1896 the sons of one Chuni Lal Sen instituted a suit in this Court, being suit No. 882 of 1896 against amongst others, the present appellants or their predecessors in title, and the present respondents or their predecessors in title, and the object of that suit was to have their shares ascertained in certain property, for possession, an account and incidental relief. The present appellants, are the sons and heirs of one Moni Madhub Sen, who was an original defendant in that suit but died during its pendency, and the present appellants were brought on the record as party defendants in the place of their deceased father. In that suit, an issue was raised as between themselves and the sons of Beni Madhub Sen who were the really contesting defendants in that suit and who are the respondents on the present appeal, as to whether, the sons and heirs of Moni Madhub Sen were entitled to a $\frac{1}{3}$ share in the premises scheduled to the plaint in that suit, and they supported the case of the plaintiffs. It would appear from paragraph 17 of the written statement in

(1) (1868) 12 M. I. A. 244, 252.

(4) (1859) 7 M. I. A. 323 (357).

(2) (1879) 8 B. L. R. 536, 537.

(5) (1905) 1 C. L. J. 337, 347.

(3) (1888) 1 L. R. 11 All. 47, 53.

(6) (1903) 1 L. R. 31 Calc. 195, 201.

the present suit that this issue was actually invited by and raised at the instance of the heirs and representatives of Beni Madhub Sen, the present respondents. The position of the present appellants in the previous suit was the same as that of the plaintiffs in that suit. In that suit the present appellants and their mother Sreemati Munjuri Dassi were declared entitled to a $\frac{1}{3}$ share in the scheduled property and entitled to obtain possession of the share to which they were held to be so entitled. That suit was a long and expensive one and was fought out with the result I have stated, the plaintiffs in that suit being declared entitled to five-sixth of the scheduled properties. By the decree in that suit which is dated the 20th of April 1903, it was expressly declared that the present appellants were jointly entitled to one-third part or share of the property in dispute and the present respondents were to deliver to them "quiet possession of the shares of the said premises to which they have been declared entitled as aforesaid." No doubt, in strictness the present appellants ought to have been transferred from the category of defendants and joined as co-plaintiffs. But, as now appears, the issue I have referred to, as to the right of the present appellants to a one third share of the scheduled property, was at the invitation of the present respondents decided in that suit. The present respondents or their predecessors in title appealed against that judgment, and, on the 22nd of February 1904, the appellate Court confirmed the decree in the main but set aside the decree so far as it related to the present appellants. Whether the appellate Court would have arrived at that conclusion if it had then known, as this Court now knows, that the question as to the right to the one-third share was raised and decided in the previous suit at the instance of the present respondents or their predecessors in title, is to say the least (I say so because I was a party to the judgment) probably open to doubt. But no doubt the decree was reversed and we must deal with the matter on the footing of that reversal. In this state of circumstances, the learned Judge in the Court of first instance held that the suit was barred, and the plaintiffs in the present suit have appealed. Their case is that their rights must be taken to have been suspended between the 20th of April 1903, the date of the decree in the first suit, and the 22nd of February 1904, the date of the reversal of that decree, and it is conceded that if this period be excluded on the ground that their rights were so suspended, the present suit is within time. It is also

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contended that section 14 of the Limitation Act covers the present case. As to the latter point, we feel grave doubt whether the case falls within that section : but it is unnecessary to decide that point, as we think the present appellants are entitled to succeed upon the other point.

It is clear that under the decree of the 20th of April 1903, the present appellants with others were declared entitled to a one-third share in the property, and that the present respondents were ordered to deliver up quiet possession to them of this share. It is perfectly true that that decree was passed in a suit which *qua* the position of parties, may be said not to have been properly framed. No doubt if the attention of the Court, when it passed that decree, had been called to this, it would, in the circumstances have transferred the present appellants from the category of defendants into that of co-plaintiffs. It seems to us, however, that this was a decree which, so long as it stood undischarged, was susceptible of execution at the hands of the present appellants, and whilst that decree existed, it was not open to them in the circumstances to institute a fresh suit for the attainment of the very object which had been successfully attained by them in the previous suit. We think, therefore, in these circumstances that the right of the plaintiffs to bring an action to recover the property was suspended between the 20th of April 1903 and the 22nd of February 1904, and that the case falls within the principle laid down by the Judicial Committee of the Privy Council in the cases of *Mussummat Ranee Sarno Moyee v. Shooshee Mokhee Burmania*, (1) and of *Prannath Roy Chowdhury v. Rookea Begum* (2). It is conceded that at the time of the institution of the first suit, the plaintiffs' claim was not barred.

In this connection the language of Lord Eldon in *Pulteney v. Warren* (3) has some application : "If there be a principle, upon which Courts of justice ought to act without scruple, it is this : to relieve parties against that injustice occasioned by its own acts or oversights at the instance of the party, against whom the relief is sought. That proposition is broadly laid down in some of the cases." This view was approved of by the House of Lords in the *East India Company v. Campion* (4).

For these reasons, we are unable to concur in the view taken by the learned Judge in the Court of first Instance. The appeal must be allowed with costs both here and in the Court below and

(1) (1868) 12 M. I. A. 244.

(3) (1801) 6 Vesey, 73 ; 5 R. B. 226

(2) (1859) 7 M. I. A. 323 (357).

(4) (1837) 6 Bligh, 158 ; 4 Cl. & F. 616.

the case must be remitted to be tried out on the merits, if after the contest which took place in the previous suit, the present respondents think that there are still any merits to be discussed.

S. C. Mitter, Attorney for the Appellants.

S. C. Dutt and Romesh Chunder Bose, Attorneys for the Respondents.

S. C. R.

Appeal allowed.

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CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

BEPIN CHANDRA PAL

v.

EMPEROR.*

CRIMINAL.

1907.

November, 11, 20.

Criminal Procedure Code (Act V of 1898), Secs. 234, 235, 480, 482, 537—Misjoinder of charges—Drawing up of proceedings on the same day that offence is committed—Indian Penal Code (Act XLV of 1860), Secs. 178, 179—Refusing to take an oath—Refusing to answer questions. Oath, refusal to take.

Where at the same trial an accused person is charged with two offences under Sec. 178 of the Indian Penal Code and two offences under section 179 of the Indian Penal Code :

Held, the case was not governed by Sec. 234 of the Criminal Procedure Code and there was no misjoinder. Moreover, the facts having all been admitted and the sentence passed being practically for only one of the offences, the accused was not prejudiced and the irregularity, if any, was cured by section 537 of the Criminal Procedure Code.

Section 482 does not require the Magistrate to draw up proceedings on the same day that the offence is committed. The section need not be read along with section 480 of the Criminal Procedure Code.

Quære. Whether a person who has once committed an offence under section 178 of the Indian Penal Code can be held to have committed a further offence under section 179 of the Indian Penal Code when he refuses to answer the questions put to him.

Petition by the Accused.

Case under sections 178 and 179 of the Indian Penal Code.

Mr. C. R. Das and Babu Sarat Chandra Sen for the Petitioner.

C. A. V.

The following judgments were delivered :

Rampini J.—The petitioner, *Bepin Chandra Pal*, was convicted on the 10th September last of three offences under sections 178 and 179, Indian Penal Code, and sentenced to three terms of

November, 20.

* Criminal Revision No. 1279 of 1907 against the order of *R. A. N. Singh Esq.* Presidency Magistrate, Calcutta, dated the 10th September 1907.

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six months' simple imprisonment, the sentences to run concurrently. The present application for revision was presented to the Vacation Bench on Monday, the 4th instant. Mr. Das appeared on the 11th instant in support of it. Mr. Das contends (1) that the conviction of his client is illegal on the following grounds : (a) that there was misjoinder of charges ; (b) that the commitment order was illegal ; and (c) that it contained no specification of the offences alleged to have been committed ; (2) that the offences are alleged to have been committed on the 26th and 29th August and the commitment order was not drawn up until the latter date ; and (3) that the petitioner was an accused on the 29th August and so should not have been required to take an oath.

The facts are that the petitioner was called as a witness for the prosecution in the case of *Emperor v. Arabindo Ghose*, under section 124A. On the 26th August last he was put into the witness box, but he declined to take the oath or to answer any questions put to him with regard to the case. He was then required to execute a personal recognizance of Rs. 50 to appear again. On the 29th August he was again called on to take the oath and answer questions, but he again declined to do either. The Chief Presidency Magistrate, before whom the petitioner had appeared as a witness, then recorded the facts and sanctioned and directed his prosecution before the Third Presidency Magistrate. On the 4th September, at the request of the petitioner's counsel, the case was postponed to the 10th September. On the 10th September the petitioner was convicted of three offences under sections 178 and 179, Indian Penal Code, and sentenced as already mentioned.

The first objection urged by the learned counsel for the petitioner is that the trial was illegal, as there was misjoinder of charges. He relies on the case of *Subrahmania Ayyar v. King-Emperor* (1). But the decision of their Lordships of the Privy Council in that case can have no application to the present. The trial in the present case was a summary one under the special procedure provided for Presidency Magistrates' Courts. No charge sheet was required to be drawn up. Furthermore, there was no trial in the sense of an investigation of facts, for the facts were all admitted by the petitioner. The petitioner can have in no way been prejudiced by charges with two heads, in each of which he was charged with committing offences under sections 178 and 179, being drawn up. He was convicted of only three

(1) (1901) I. L. R. 25 Mad. 61.

offences, two of which are of the same kind. The provisions of section 234 have therefore not been contravened. He has been sentenced to practically one punishment for all three offences.

Then the learned counsel for the petitioner impugns the correctness of the order of the Chief Presidency Magistrate sanctioning and directing his prosecution before the Third Presidency Magistrate. In particular it is objected that the Chief Presidency Magistrate directed his prosecution for "an offence under section 178 and 179," which, it is said, would not justify his prosecution for two offences under section 178 and one under section 179. An offence under section 178 is quite distinct from one under section 179. The Chief Presidency Magistrate could not have meant, as the learned counsel contends he did, that the petitioner should be prosecuted for only one offence, *i.e.*, that the prosecution should be either under section 178 or section 179. The Chief Presidency Magistrate, no doubt, meant that the petitioner should be prosecuted for an offence under section 178 and for an offence under section 179. But in any case, the petitioner has been in no way prejudiced, for he has been sentenced to undergo only a period of simple imprisonment to which he was liable for one offence under section 178 or section 179. There is no question as to the facts, for on his own showing and that of his learned counsel, he clearly committed offences under sections 178 and 179.

The learned counsel's next contention is that the Magistrate should have recorded the facts and passed the order of commitment on the 26th August, and that he had no right to abstain from passing orders on the 26th August, and to recall the petitioner on the 29th August and again call on him to take the oath and give evidence. The Chief Presidency Magistrate proceeded under section 482 of the Criminal Procedure Code. There is no provision in this section, as there is in section 480, that he should take proceedings the same day as that on which the offence is committed. The Magistrate's procedure in postponing orders to the 29th August was no doubt prompted by a humane desire to give the petitioner a *locus penitentie* and an opportunity of purging himself of his contempt and not by any wish to lead the petitioner into committing further offences.

The learned counsel's next contention is that on the 29th August the petitioner was not an accused and no oath should have been required of him. But he was called on to take an oath as a witness and not as an accused. No oath was required of him as an accused.

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The last question that arises is as to the sentence. The petitioner has practically been sentenced to only six months' simple imprisonment. Considering the nature of the case in which the petitioner was called on to give evidence and of the deliberate character of the attempt made by him to frustrate and impede the administration of justice, I do not consider the sentence too severe.

The application is rejected.

Sharfuddin J.—The petitioner in the present case, is one Bepin Chunder Pal. He was convicted by the Third Presidency Magistrate on the 10th September last, of three offences namely, two under section 178, Indian Penal Code, committed on the 26th and 29th of August last, and one under section 179, Indian Penal Code, committed on the 29th of that month,—and sentenced to six months' simple imprisonment for each of the above offences, sentences to run concurrently. The petitioner now applies for a revision.

The original case in which the petitioner was summoned as a witness for the prosecution was the case of *Emperor v. Arabindo Ghosh*, under section 124A. It appears that one of the dates for the hearing of that case was the 26th of August last, the petitioner on appearing as a witness was required to bind himself by an oath or affirmation to state the truth but he refused to do so. The Chief Presidency Magistrate, who was trying the original case, took a personal recognizance from the petitioner to appear on the following day. The petitioner's case was adjourned on 27th and 28th of August last, and in his re-appearance on the 29th of August he again refused to bind himself by oath or affirmation. On both the dates he also refused to answer any question with reference to the case in which he was called as a witness. On the 29th August the Chief Presidency Magistrate drew up a proceeding against the petitioner requiring him under section 482, Criminal Procedure Code, to appear for trial on the 4th of September before the Third Presidency Magistrate for "an offence under sections 178 and 179, Indian Penal Code." It appears that the petitioner has admitted all the facts with reference to his refusal to take any part in the prosecution of Arabindo Ghosh. The trying Magistrate has drawn up a charge with two heads, first, under section 178, Indian Penal Code, regarding offences committed on the 26th and 29th of August last; the second under section 179 regarding offences committed on the above dates. The trying Magistrate has acquitted the

petitioner with regard to the offence under section 179, Indian Penal Code, committed on the 26th of August and has convicted him of the other three offences and sentenced him as above stated.

We have been asked to quash the sentences on the following grounds : (1) that there was misjoinder of charges, the provisions of section 234, Criminal Procedure Code, having been contravened ; (2) that the order of commitment was not in accordance with law inasmuch as the said order does not specify the offences that are said to have been committed ; (3) that the offences having been committed on the 26th and 29th of August, the trying Magistrate was wrong in drawing up any proceeding on the 29th of August with reference to the offences committed on the 26th of that month ; (4) that from the 26th of August the position of the petitioner being that of an accused, the lower Court was wrong in requiring him on the 29th of August to bind himself by an oath or affirmation ; (5) that the petitioner having once committed an offence under section 178, Indian Penal Code, cannot be held to have committed a further offence under section 179, Indian Penal Code, as the section provides for the case of a witness who being on oath refuses to answer any question relevant to the inquiry.

The third Presidency Magistrate has sentenced the petitioner practically to only one punishment of six month's simple imprisonment for all the three offences, and under the circumstances in accordance with the special procedure it was not necessary for him to draw up any charge sheet at all. It was urged that the provisions of section 234, Criminal Procedure Code, have been contravened inasmuch as the petitioner has been charged with and tried at one trial for more than three offences. What appears to have been forbidden under the provisions of section 234, Criminal Procedure Code, is that when a person is accused of more offences than one of the *same kind* committed within the space of twelve months from first to the last of such offences, he ought not to be charged with and tried at one trial for more than three of such offences. Clause 2 of that section provides that offences, are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law. Before the application of the provisions of section 234, Criminal Procedure Code, to the petitioner's case, we have to find out whether all the requirements of this section are present in his case ; for if they are not so, this

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section can have no application. The petitioner was charged for having committed two distinct offences under two different sections of the Indian Penal Code on the 26th of August last and again two distinct offences under two different sections of the Indian Penal Code on the 29th of that month. It is therefore clear that the petitioner was not charged for more than three offences of the same kind, nor was he tried at one and the same trial for more than three of such offences. Under the above circumstances the petitioner's case does not fall under section 234, Criminal Procedure Code. The provisions of section 23 are general in their nature requiring that there should be a separate charge and separate trial for every distinct offence, except in the cases mentioned in sections 234, 235, 236 and 239, Criminal Procedure Code. I have already observed that section 234 has no application as the offences are not of the same kind.

Section 235, Criminal Procedure Code, relates to the case of a person who in one series of acts so connected together as to form the same transaction, has committed more than one offence. This section provides that in such a case the accused person may be charged with and tried at one trial for every such offence. The transaction here referred to is marked by oneness as to time and place. Illustrations (a), (b) and (c) refer to cases where different offences form parts of one continuous series of acts. In deciding the question whether the acts alleged form parts of the same transaction, elements for consideration should be the proximity of time and the intention and similarity of action. In the present case there was proximity of time and the intention of the petitioner was clearly to frustrate and impede the administration of justice by refusing to give evidence in the case in which he was called to give evidence. I think that the petitioner's case clearly falls under section 235, Criminal Procedure Code. For the above reasons, I am of opinion that there was no misjoinder of charges. The second objection urged on behalf of the petitioner is that the order of commitment does not specify the offences that are said to have been committed by him. The Chief Presidency Magistrate in his order of commitment says that in his opinion, Bepin Chandra Pal had committed, "an offence under sections 178 and 179, Indian Penal Code." An attempt is now made to take advantage of the expression "an offence." It is urged that the petitioner was committed for trial for having committed only one offence. From the wordings and general tenour of the commitment order, it is clear that the order of commitment related to

offences under sections 178 and 179, Indian Penal Code, and not to any one offence as urged.

The third objection is that the commitment order, dated the 29th of August, ought not to have referred to the offence committed on the 26th of that month. It is contended that section 482, Criminal Procedure Code, ought to be read with the two previous sections, and as no proceeding was drawn up on the 26th of August, the Chief Presidency Magistrate had no power to draw up a proceeding on the 29th of August with reference to what had happened on the 26th of that month. Assuming that section 482, Criminal Procedure Code, required the proceeding to be drawn up on the day the offences were committed, this objection is of no avail to the petitioner, inasmuch as the proceeding of the 29th of August related also as to what had happened on that date. The petitioner has been convicted under sections 178 and 179, Indian Penal Code, for offences committed on the 29th of August, and for each of these offences he has been sentenced to six months' simple imprisonment to run concurrently. If the conviction and sentence under section 178, Indian Penal Code, for the offence committed on the 26th of August cannot stand on the above ground, the other sentences remain as they are.

The fourth objection is that the petitioner was an accused on the 29th of August, and the Chief Presidency Magistrate was wrong in recalling him on the 29th and directing him to take an oath and answer questions put to him. There is no doubt that the petitioner was an accused party in his own case *i.e.*, in the case of *Emperor v. Bepin Chundra Pal*, but his position as an accused in his own case did not affect his position as a witness in the case of *Emperor v. Arabindo Ghose*. There is no law that disqualifies an accused party from giving evidence in a case in which he is simply called as a witness and himself is not an accused.

The fifth objection is that the petitioner having once committed an offence under section 178, Indian Penal Code, cannot be held to have committed a further offence under section 179, Indian Penal Code, as the latter section provides for the case of a witness who being on oath refuses to answer questions relevant to the enquiry. Assuming that this proposition of law is correct, there still remains the petitioner's conviction and sentence under section 178 for his refusal to take the oath on the 29th of August.

The petitioner admits in his written statement that every member of society is bound to help the administration of justice by giving evidence in the interest of social well-being and also

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admits having refused to take the oath. He further says in his written statement that his refusal was actuated by the belief that the prosecution was prompted by executive policy. The petitioner appears to be a journalist and a preacher and presumably a man of education. That being so, I do not consider that a sentence of six months' simple imprisonment even under one section, namely, section 178, Indian Penal Code, for his deliberate refusal to take an oath on the 29th of August is at all excessive. I concur with my learned brother in rejecting this application.

N. K. B.

Application refused.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

LEAKUT HOSSEIN KHAN

v.

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CRIMINAL.

1907.

December, 3.

Criminal Procedure Code (Act V of 1898), Sec. 487—Presidency Magistrate—Power to try case of disobedience of his own order—Indian Penal Code (Act XLV of 1860), Sec. 188.

A Presidency Magistrate has no jurisdiction to try a case under section 188, Indian Penal Code, when the order which is alleged to have been disobeyed was an order which he had himself passed.

Rule obtained by the Accused.

Case under section 188 of the Indian Penal Code.

Babu Narendra Kumar Basu for the Petitioner.

The Standing Counsel (Mr. S. P. Sinha) for the Crown.

The facts so far as are material to this report appear from the judgment.

The judgment of the Court was delivered by

Rampini J.—This is a Rule calling upon the Chief Presidency Magistrate of Calcutta to show cause why his order, dated the 4th November 1907, convicting the petitioner, Leakut Hossein, under section 188, Indian Penal Code, and sentencing him to six months' rigorous imprisonment, should not be set aside, on the ground that he had no jurisdiction to deal with a case of disobedience of his own order, in contravention of the terms of section 487, Code of Criminal Procedure.

The facts of the case are these. The petitioner has been tried, under section 188, Indian Penal Code, for disobedience of

* Criminal Revision No. 1337 of 1907, against the decision of D. H. Kingsford, Esq., Chief Presidency Magistrate, Calcutta, dated the 4th November 1907.

the order of the Chief Presidency Magistrate, issued under section 144, Code of Criminal Procedure directing him, to refrain from leading, or taking part in, processions along the public streets of Calcutta and from holding and addressing meeting in Calcutta. This order was issued by Mr. Kingsford, the Chief Presidency Magistrate; and subsequently the petitioner was charged with having disobeyed it, and after being tried by the Chief Presidency Magistrate, he was sentenced to six months' rigorous imprisonment.

A Rule was asked for by Mr. Chowdhury on the following grounds, namely, *first*, that the order, under section 144, Code of Criminal Procedure, was passed *ex parte*, and did not purport to have been passed in an emergency; *secondly*, that the petitioner was not allowed to show cause against the order; and, *thirdly*, that there is nothing on the record to prove that the disobedience of the order tended to cause a riot, or an affray, or danger to human safety.

We heard Mr. Chowdhury in support of these pleas and considered the matter. But we did not think these pleas sufficient to justify us in issuing a Rule. It is not necessary for us to give our reasons for rejecting the three pleas cited above, because we came to the conclusion, after examining the proceedings, that a Rule should be issued on *another* ground, namely, that the order under section 144, Code of Criminal Procedure having been issued by the Chief Presidency Magistrate, he had no jurisdiction to try the petitioner for disobedience of it, and that, consequently, his order being in contravention of section 487, Code of Criminal Procedure, is without jurisdiction.

Mr. Sinha appears before us to-day on behalf of the Crown and states that he has no cause to show against the Rule being made absolute. But he prays that an order may be passed by us for the retrial of the petitioner.

We think that the learned Standing Counsel has taken a proper view of the matter. It seems impossible to resist the conclusion that the Chief Presidency Magistrate had, under section 487, Code of Criminal Procedure, no authority to try a case of disobedience of his own order, because section 487 expressly lays down that no Magistrate can try a case of disobedience of his own order.

It appears to us that the terms of section 487, Code of Criminal Procedure, as contained in the Code of 1898, are wide enough to include Presidency Magistrates. The word in the

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section is "Magistrate;" and that must include a Presidency Magistrate unless the definition of Magistrate excludes Presidency Magistrate, which it appears to us, it does not. No doubt, in the Code of 1882, the provisions of section 487 were different; and section 487 of that Code gave express power to Presidency Magistrates to try cases of disobedience of their own order. That section was modified in the Code of 1898, and no such power is given in section 487 of the Code now in force. For these reasons we think that Mr. Kingsford's order is without jurisdiction.

We, therefore, make the Rule absolute and direct that the petitioner be set at liberty.

Mr. Sinha asks us to order the retrial of the accused. We do not, however, think it is ordinarily our duty to order the retrial of any person. But we will observe that the order we now pass setting aside the conviction and sentence is no obstacle, in our opinion, to the accused being retried, if the prosecution thinks it advisable to retry him.

N. K. B.

Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

RAM PERSHAD KOERI AND OTHERS

v.

JAWAHIR ROY AND OTHERS.*

CIVIL.

1907.

August, 26, 27.

Abandonment—Bengal Tenancy Act (VIII of 1885), Sec. 87, not exhaustive—Abandonment, a question of intention—Mortgage of non-transferable holding—Mortgagee auction-purchaser—Mortgagor, interest of—Effectment of purchaser by landlord—Re-entry—Execution sale—Voluntary abandonment.

The first sub-section of section 87 of the Bengal Tenancy Act shows that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due, and for cultivating the land.

Whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case.

In order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under sub-section 2 of section 87 of the Bengal Tenancy Act is not necessary. The only effect of the service of notice is to

* Appeal from Appellate Decree No. 658 of 1906, against the decision of Babu Nistaran Banerjee, Subordinate Judge of Shahabad, dated the 3rd February 1906, reversing that of Mr. S. N. Ahmad, Munsiff of Shahabad, dated the 17th August 1905.

make it obligatory upon the tenant to have a speedy determination of the question whether there has been an abandonment or not.

Section 87 of the Bengal Tenancy Act is not exhaustive and a landlord is not a wrong-doer merely because he re-enters upon the holding before he has followed the procedure laid down in that section.

When the holding is a non-transferable one, and the ryot executes a mortgage, the mortgage is inoperative as against the landlord, but as between mortgagor and mortgagee, the mortgage is operative.

Bagirath v. Sheikh Hafizuddin (1) referred to †

Where the mortgagee of a non-transferable occupancy holding purchases the holding in execution of his mortgage decree and takes possession, the possession of the tenant mortgagor completely ceases, and the holding passes into the occupation of the mortgagee. As against the landlord, the mortgagee auction-purchaser is a trespasser. The landlord is entitled to sue him and to obtain a decree for ejectment; in such a suit the tenant who is not in occupation is not a necessary party.

Under the circumstances of the case, the abandonment of his holding by the tenant, although due to the execution sale, is a voluntary one.

Appeal by the Plaintiffs.

Suit for recovery of possession.

The facts and arguments appear sufficiently from the judgment of the Court.

Babus Mahendra Nath Roy and Makhun Lal for the Appellants.

Babu Dwarka Nath Mitter for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—The subject matter of the litigation which has given rise to this appeal is an agricultural tenancy held by the plaintiffs appellants under their landlords, the defendants respondents. It appears that the plaintiffs executed a mortgage of this property in favour of the fifth defendant, who obtained an *ex parte* decree thereon in the year 1892. Subsequently, in execution of the decree, the holding was sold and purchased by the decree-holder who obtained delivery of possession in 1898. In 1902, the landlords brought a suit for declaration that the holding was non-transferable and that the purchaser at the mortgage sale had not acquired any interest therein. The present plaintiffs were not made defendants to that litigation. In 1903, the landlords obtained a decree for ejectment as against the purchaser at the execution sale. They executed the decree and on the 30th June 1904 obtained delivery of possession through the Court. On the 30th August 1904, the plaintiffs commenced this action for recovery of possession. Their case

(1) (1900) 4 C. W. N. 679.

† See *Ayenuddin v. Srisak Chandra* (1903) 11 C. W. N. 79—Rep.

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as laid in the plaint is that at the date of the institution of the suit they had a subsisting tenancy right, and that the re-entry by the landlords was unlawful. The Courts below have concurrently held that there was a mortgage decree in 1892, followed by a sale in 1898, and that since the date of the sale, the plaintiffs have not been in possession of their holding. The Court of first instance, however, made a decree in favour of the plaintiffs on the ground that their tenancy right had not been extinguished. The Subordinate Judge has reversed that decision on the ground that there was an abandonment by the plaintiffs, and that at the date of the institution of the suit, there was no subsisting tenancy on the basis of which they were entitled to recover possession.

The plaintiffs have now appealed to this Court, and on their behalf it has been contended, that the tenancy was subsisting at the date of the commencement of the action, inasmuch as admittedly, the landlords did not re-enter after they had complied with the provisions of section 87 of the Bengal Tenancy Act. The substantial question, therefore, which calls for decision is whether the provisions of section 87 are exhaustive, or whether a tenancy may be terminated by voluntary abandonment and the landlord may lawfully re-enter even though he does not follow the procedure laid down in that section.

The first sub-section of section 87 provides that if a raiyat voluntarily abandons his residence without notice to his landlord and without arranging for payment of his rent as it falls due and ceases to cultivate his holding either by himself or by some other person, the landlord may at any time after the expiration of the agricultural year in which the raiyat so abandons and ceases to cultivate the holding, enter on the holding and let it out to another tenant or take to cultivation himself. The reasonable construction of which this subsection admits, appears to us to be that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due, and for cultivating the land. If a tenant ceases to cultivate his holding either by himself or by some other person, if he omits to make arrangement for the payment of rent as it falls due, and if he does these acts without notice to his landlord, there is an abandonment. No doubt whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case. But we are unable to accept the contention of

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the learned vakil for the appellants that in order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under sub-section 2 of section 87 is necessary. One test seems to be conclusive upon the point. If the service of notice by the landlord is necessary for the determination of the tenancy, how is it that under sub-section 3, it is open to the tenant even after such notice has been served, to recover possession from the landlord, on the ground that as a matter of fact there was no abandonment, because although he might have temporarily vacated his holding, he had no intention to abandon it. Sub-section 3 conclusively shows that the abandonment, if there is one, is independent of the service of notice. The only effect of the service of notice is to make it obligatory upon the tenant to have a speedy determination of the question, whether there has been an abandonment or not. If the landlord re-enters without service of notice under sub-section 2, it is open to the tenant to bring a suit for recovery of possession till his rights have been extinguished by the law of limitation. In other words, if the tenant is an occupancy raiyat, he has two years from the date of dispossession within which to bring a suit under Schedule 3, Article 3 of the Bengal Tenancy Act. If on the other hand, he is a non-occupancy raiyat, he could sue within a period of six, if not twelve years upon the authority of the Full Bench decision of this Court in the case of *Tamizuddin v. Ashrub Ali* (1). [Reference may be made to Art 3, as recently amended, which fixes a period of two years for all raiyats and under-raiyats.] When, however, the notice under sub-section 2 has been served, the tenant, who wishes to recover possession of the holding, must, if an occupancy raiyat, bring the suit not later than the expiration of two years and if a non-occupancy raiyat, must bring a similar suit not later than the expiration of six months, from the date of the notice. We are, therefore, unable to uphold the contention of the learned vakil for the appellants, that section 87 is exhaustive and that the landlord is a wrong-doer if he re-enters upon the holding before he has followed the procedure laid down in that section. We have arrived at this conclusion upon a construction of the section itself and independently, of the decided cases on the point. The learned vakil for the appellants, has however, invited our attention to the cases of *Lal Mamud Mandul v. Arbullah Sheikh* (2), *Samujan Roy v. Munshi Mahaton* (3), *Madav Mondal v. Mahima Chandra Mazumdar* (4), and *Rajani Kanta Biswas v. Ekkouri*

(1) (1904) I. L. R. 31 Calc. 617.

(2) (1896) 1 C. W. N. 198.

(3) (1900) 4 C. W. N. 493.

(4) (1906) I. L. R. 33 Calc. 531.

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Das (1). In the first of these cases, it was held expressly that the provisions of section 87 are not exhaustive, as that section does not define abandonment, or give an exhaustive description of the facts which constitute abandonment. This case, therefore, is clearly opposed to the contention of the appellants. The second case is also against the view urged on behalf of the appellants, at any rate, it undoubtedly does not justify an inference in their favour. The learned Judges who decided that case held that where a raiyat had sold a non-transferable holding, was no longer in possession of the same and paid no rent for it and the landlord brought a suit to eject both the transferor and transferee, the landlord was entitled to a decree; it was observed that no notice under section 87 was necessary to enable the landlord to obtain possession of the holding, inasmuch as the provisions of that section were not exhaustive. If the contention of the present appellants were well-founded, in a suit by the landlord as against the tenant and his transferee, the plaintiff would not be entitled to decree as against the tenant, because if the service of notice under sub-section 2 of section 87 was essential to complete a valid abandonment, there was no termination of the tenancy, and the landlord would consequently be entitled to a decree only as against the transferee but not as against the transferor. This is unquestionably not the view taken in the case of *Samujan Roy v. Munshi Mahaton*, (2). In the judgment in the third case, there is one passage which the learned vakil for the appellants contends is at least ambiguous and may possibly be construed in his favour, the passage in question is as follows:—If we read the words of Sir Richard Couch in his judgment in *Narendro Narain Roy v. Ishan Chunder Sen* (3) along with section 87, "there can be no doubt, that in order to entitle the landlord to re-enter in abandonment by tenant, it must be abandonment in the words of section 87, namely that the raiyat voluntarily abandons his residence without notice to the landlord and without arrangement for payment of rent as it falls due and ceases to cultivate. In such a case the landlord's entry would be legal and he may then let out the land to another tenant or take it into cultivation himself." Now, it is to be observed that the learned Judges do not say expressly that service of notice under section 87 is essential for the purpose of a valid and complete abandonment, and lawful re-entry by the landlord on the basis thereof. On the other hand, the language used is certainly consistent with the view that for the

(1) (1907) I. L. R. 34 Calc. 689.

(2) (1900) 4 C. W. N. 493.

(3) (1874) 22 W. R. 22.

purposes of a valid abandonment, two things are necessary namely, the abandonment by the tenant of his residence and cessation of cultivation and omission on his part to make arrangement for the payment of rent as it falls due. No doubt the passage in question has been somewhat differently interpreted in the fourth case cited before us, namely *Rajani Kanto Biswas v. Ekkouri Das* (1). But the learned Judges who decided the last case expressed an opinion that the provisions of section 87 are not exhaustive. It is clear, therefore, upon a review of all these decisions, that there is no authority in support of the position taken up by the appellants, and as we have already explained upon reason and principle also, that view cannot be maintained. We are fortified in this opinion by the circumstance that section 87 has been left untouched in the recent amendment of the Bengal Tenancy Act, it is not unreasonable to conclude, therefore, that the construction put upon the section in the case of *Lal Mamud v. Arbullah* (2), which was decided ten years ago, and has never been challenged during this period, is in accordance with the true intentions of the Legislature.

What then is the position of the parties in this case if tested in the light of these principles? The holding in question is non-transferable; the plaintiffs executed a mortgage in favour of the 5th and 6th defendants; the mortgage in question was inoperative as against the landlord, but by reason of the doctrine of estoppel, as between the mortgagor and mortgagee, the mortgage was unquestionably operative. [See the decision of this Court in *Bhagirath v. Shafeld* (3).] The mortgagee then brought a suit to enforce the security, it was not open to the mortgagor to deny the title of the mortgagee; the mortgagee, therefore, obtained a decreè. He executed it, had the property sold, purchased it himself and took possession. The result of this was that the possession of the plaintiff completely ceased and the holding passed into the occupation of the mortgagee. As against the landlord the mortgagee, auction-purchaser was undoubtedly a trespasser. The landlord, therefore, was entitled to sue him as he did, and to obtain a decree for ejectment. It is suggested, however, that the landlord was bound to join the tenant as a defendant in that action. In our opinion, there is no substance in this contention. There was plainly no cause of action as against the tenant. An action for ejectment could not be maintained against the tenant who was

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(1) (1907) I. L. B. 34 Calc. 689.

(2) (1896) 1 C. W. N. 198.

(3) (1900) 4 C. W. N. 679.

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admittedly not in occupation of any portion of the lands and if the tenant had been joined as a defendant he would have been entitled to ask for dismissal of the suit as against him, on the ground of want of cause of action. In our opinion, the landlord rightly ejected the mortgagee, auction purchaser. The tenant turns now round and contends that he is entitled to re-enter, because although he has been out of possession since 1898, that is for a period longer than six years before the institution of the suit, there was no abandonment and the tenancy did not terminate. Upon no conceivable principle, can this position be maintained, and a bare statement of the facts is sufficient to show that there is no foundation for the contention of the appellants.

It was further suggested faintly, that the abandonment in this case, if there was any, was not voluntary. It was argued that the plaintiffs lost possession by an involuntary act, namely, by reason of an execution sale. It must be remembered, however, that the execution sale was due directly to a voluntary act of the tenant and is not properly attributable to the act of a stranger. The mortgage was no doubt a voluntary act on the part of the tenant. His omission to pay the mortgage debt was admittedly voluntary; and his failure to satisfy the mortgage decree, when obtained, was equally voluntary. How can it be contended then with any show of reason, that he lost possession of the holding by an involuntary act? In our opinion, the facts found conclusively show that the holding in question has been abandoned, and that at the date of the institution of this suit, the plaintiffs had no subsisting title on the basis of which they could justly claim to recover possession thereof from the landlords.

The appeal consequently fails and is dismissed with costs.

A. T. M.

Appeal dismissed.

Before Mr. Justice Rampin and Mr. Justice Sharfuddin.

RAJANI KANTA BISWAS AND OTHERS

v.

EKKARI DAS AND OTHERS.*

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May, 15, 21.

Bengal Tenancy Act (VIII of 1885), section 87—Non transferable ryoti holding—Transfer—Underlease—Forfeiture—Landlord and tenant—Secundum allegata et probata.

Where a raiyat holding a non-transferable holding transfers it to a third person, but remains in occupation of the land as his vendee's under-raiyat,

* Appeal from Appellate Decree No. 1214 of 1905, against the decision of F. Roe, Esq., District Judge of Burdwan, dated the 10th March 1905, affirming that of Babu Lall Singh, Munsiff of Burdwan, dated the 30th September 1904.

repudiates his relation as tenant, refuses to pay rent to the landlord of the raiyati holding and maintains his right to transfer a non-transferable holding and seeks by suit to re-occupy the land not as his (landlord's) tenant, but as the under-tenant of his vendee, his suit must fail. The case is not one of abandonment under section 87 of the Bengal Tenancy Act.

Kali Nath Chakrabutty v. Upendra Chandra Chowdhury (1) referred to.

Sristidhur Biswas v. Madan Sirdar (2), *Robert Wilson v. Radha Dulari Koer* (3), *Dina Nath Roy v. Krishna Bijoy Saha* (4) and *Madan Mondal v. Mahima Chandra Mazumdar* (5) explained and distinguished.

If the raiyat transferee is willing to revert to the former state of things, to re-occupy the land and pay rent to the landlord, then a suit for possession is maintainable against the landlord.

The transferee of a non-transferable raiyati holding is not a tenant of the landlord and has no legal connection with the land.

The provisions of section 87 of the Bengal Tenancy Act are not exhaustive. *Samujan Roy v. Munshi Mahaton* (6) followed.

Appeal by the Defendants Nos. 1 and 10 to 20.

Suit for declaration that a certain quantity of land appertains to ancestral jote and for a declaration that he has a right to it and for possession of it, and also for a declaration that he held the land under a *jamai* right under the defendant No. 10.

The facts of the case appear sufficiently from the judgment.

Babu Pramatha Nath Sen for the Appellant.

Babus Nilmadhub Bose, Shib Chunder Palit, Khetra Mohun Sen (for Babu Nalini Ranjan Chatterji) and Lalit Mohun Ghose for the Respondents.

C. A. V.

The judgment of the Court was as follows :

Rampini J.—The facts of the case are as follows: The plaintiff Ekkari Das alleges that, he had a jama of 2 bighas, which he held under the principal defendant. He was in want of money to meet the expenses of a marriage and accordingly sold this jama to the defendant Bipin Krishna Roy on the 23rd Baisakh 1308. The following day, *i. e.*, the 24th Baisakh 1308, he took a settlement of the jama under Bipin Krishna Roy at a rental of Rs. 20, and has remained in possession of the land ever since.

It is to be noted that this Bipin Krishna Roy was not originally made a defendant.

The suit was instituted on the 15th September 1903, and Bipin Krishna Roy was not made a party to the suit till the 23rd June 1904.

(1) (1896) I. L. R. 24 Calc. 212.

(2) (1883) I. L. R. 9 Calc. 648.

(3) (1897) 2 C. W. N. 63.

(4) (1904) 9 C. W. N. 379.

(5) (1906) I. L. R. 33 Calc. 531.

(6) (1900) 4 C. W. N. 493.

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The plaintiff goes on in his plaint to say that after the sale by him of the land to Bepin Krishna Roy, the latter sent the rent for 1308 and 1309 by money order to the landlord, the defendant No. 1, but the defendant No. 1 refused to receive it. Subsequently the defendant No. 1 demanded rent from the plaintiff, but the plaintiff told him to realize rent from the said purchaser on the allegation of the sale of the land. Then the landlord defendant detained the paddy on the land. But the plaintiff notwithstanding the detention, cut the paddy, upon which the landlord removed the paddy. The plaintiff sued him for the value of the paddy in the Small Cause Court, but lost his case. The defendant No. 1 then dispossessed him from the land.

The plaintiff accordingly brought this suit, (1) for a declaration that the 2 bighas appertain to his father's jama: (2) for a declaration that he has a right to it and for possession of it; and (3) for a declaration that he held the land under a jamai right under the defendant Bepin Krishna Roy, that the crop for 1309 was raised by him and for a decree for Rs. 40 for the value of the crop of that year. The landlord defendant pleaded that the land appertained to a jama standing in the name of Bhoirab Bagdi. The added defendant, Bepin Krishna Roy *i. e.*, the person to whom the plaintiff has sold the land, supported the plaintiff's case, maintaining that the *jote* in question was a transferable one, and that he not only sent the rent to the talukdar defendant, but also the mutation fees. The Munsiff found that the *jote* was the plaintiff's *jote*, but was of a non-transferable character and that the plaintiff did not abandon the holding by selling the land to Bepin Krishna Roy and taking a lease under him. "The plaintiff was all along in possession," the Munsiff says, "and therefore not liable to be ousted." "It is clear. I find from the evidence and circumstances of this case that Bepin Krishna Roy tried to injure the *maliks* by a *kobala* and the *maliks* took the land into their own hands and ousted plaintiff from his lands, so both parties are to be blamed, and I do not allow costs to either. The ill doing of the plaintiff in creating a new landlord is made up by the illegal acts of the *malik* defendant so to avoid multiplicity of suits, I think I may allow a relief to the plaintiff in this very suit. But I decide issues 4 and 5 against the plaintiff and issue No. 6 in his favour."

Issues 4, 5 and 6 as framed by the Munsiff, it may be mentioned, are as follows.

"Fourth—Has the plaintiff acquired any title to the disputed

land by his alleged *bandobust* from Bepin Krishna Roy ?

Fifth—Has Bepin Krishna acquired any right by his purchase from the plaintiff ? Had plaintiff any transferable interests in the land ?

Sixth—Is plaintiff entitled to get *khas* possession of the disputed land ? ”

On appeal, the District Judge affirmed the Munsiff's findings. He held that the case was on all fours with that of *Srishteedhur v. Mudan Sirdar* (1), and that the plaintiff was entitled to be restored to possession.

The defendants 1 and 10 to 20 now appeal. On their behalf it has been urged, (1) that on the facts found the plaintiff is not entitled to *khas* possession ; (2) that the lower Court have given the plaintiff *khas* possession without even ordering him to pay rent to the landlord defendant, and (3) that the plaintiff prayed for *khas* possession as an under-raiyat of Bepin Krishna Roy and that the lower Courts have given him a decree for *khas* possession of the land under a title which he did not set up, *viz.*, as the raiyat of the land.

It may be mentioned here that the defendant Bepin Krishna Roy has appeared before us by pleader, and that on his behalf it has been contended that the finding of the Courts below that the holding is a non-transferable one is wrong.

The lower Court's finding on this point is, however, a finding of fact which concludes us in second appeal.

On the facts found it would seem to us that the plaintiff is not entitled to the relief which the Courts below have given him.

The facts found are that the plaintiff was a raiyat. He had a non-transferable holding. He transferred it to Bepin Krishna Roy, which he had no right to do. It is true that he, remained in occupation of the land as an under-raiyat of Bepin Krishna Roy. But he repudiated his position as a tenant under the landlord. When the landlord asked him for rent, he refused to pay him, and told him to take rent from Bepin Krishna Roy to whom he had sold the holding. The landlord would not accept the rent from Bepin Krishna Roy, because he did not recognise him as his tenant, which he was justified in doing, as the holding has been found to be of a non-transferable nature. It would therefore seem to us that the plaintiff has abandoned his holding under the landlord. He entirely repudiated his position as a tenant under the defendant No. 1 and in this suit continues to do so, for he seeks to re-enter the land as an under-raiyat

(1) (1883) I. L. R. 9 Calc. 648.

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of Bepin Krishna Roy. It will be seen that he has made no arrangement for the continuance of the payment of rent in his name through Bepin Krishna Roy. On the contrary, throughout this suit, the plaintiff and Bepin Krishna Roy have maintained that the jote is transferable and that the defendant is bound to accept rent from Bepin Krishna Roy and from no one else. Bepin Krishna Roy has even urged this plea through his pleader before us. It would, therefore, seem that the Courts below have given the plaintiff a decree for what he did not ask, *viz*, a decree for khas possession as a raiyat of the land instead of a decree for the possession as an under-tenant of Bepin Krishna Roy.

It has, however, been argued on the other side that nothing that the plaintiff has done has really altered the previous state of things. The plaintiff after selling the land to Bepin Krishna Roy remained in possession, and though he repudiated his landlord's title and did not pay rent to him, this did not, it is said, work a forfeiture of his rights. This is quite true, and if the plaintiff in this suit had recanted and resiled and sued for possession as a raiyat under the landlord defendant No. 1, offering to pay rent to him, he would be entitled to possession and to the relief he has obtained. But he does not do so. He comes to Court saying. "I have sold my land, I will not pay rent to the landlord. I will pay rent to Bepin Krishna Roy, to whom I have sold the land and to no one else. The land-lord must take rent from Bepin Krishna Roy, and I pray for possession as an under-raiyat of Bepin Krishna Roy." But Bepin Krishna Roy has now been found by the Courts below to have no title in himself and consequently no title which he can convey to the plaintiff.

The plaintiff's pleader himself admits that his client has made "a mistake" in the way he has shaped his suit, and suggests that this be overlooked, but it would seem to us that a plaintiff is entitled to relief *secundum allegata et probata* and not according to what he did not ask for or prove. In short, the case would seem to us to come within the purview of the ruling of this Court in *Kalinath Chakravarti v. Upendra Chunder Chowdhry* (1) which has been relied on by the pleader for the appellant. The appellant's pleader has also cited the cases of *Narendra Narain Roy v. Ishan Chunder Sen* (2), *Dwarka Nath Misser v. Hurrish Chunder* (3), and *Samujan Roy v. Munshi Mahaton* (4).

(1) (1896) I. L. R. 24 Calc. 212.

(2) (1874) 22 W. R. 22.

(3) (1879) I. L. R. 4 Calc. 925.

(4) (1900) 4 C. W. N. 493.

They are all in his favour no doubt, but are not exactly in point.

On the other hand, the cases of *Srishteedhur Biswas v. Mudan Sirdar* (1), *Wilson v. Radha Dulari Koer*, (2) *Dina Nath Roy v. Krishna Bijoy Saha*, (3) *Mathur Mundal v. Ganga Charan Gope*, (4) and *Madar Mondal v. Mahima Chundra Mazumdar* (5) have been relied on. But none of these, except the last, can possibly be said to conflict with the view we take of this case.

In *Sristeedhur Biswas v. Mudan Sirdar* (1) it is laid down that a raiyat having a right of occupancy is not liable to ejectment by his superior landlord merely because he has asserted a transferable right in the land and sold that right to a stranger, without giving up possession of the land. This is no doubt good law, but the plaintiff has done more. He has expressly repudiated his relation as tenant to the landlord and he seeks to recover possession not as his landlord's tenant, but as the under-tenant of a person who has been found to have no title.

In *Wilson v. Radha Dulari Koer* (2), it has been decided that where a tenant transfers his holding and abandons possession of it, the landlord is entitled to eject the transferee. This does not help the plaintiff. It is not said in that case that it is only when the plaintiff abandons possession that the landlord can eject the transferee. In the case of *Samujan Roy v. Munshi Mahaton* (6) it has been expressly pointed out that the provisions of section 87 of the Bengal Tenancy Act are not exhaustive.

In the case of *Dina Nath Roy v. Krishna Bejoy Saha* (3), it was held that the landlord was entitled to a decree for possession against the defendant No. 1, the transferee of a non-transferable holding, but was not entitled to get khas possession against defendants 2 and 3 (the transferors), but only to receive rent from them.

But in that case it will be seen the transferors, the defendants 2 and 3, professed themselves to be quite willing to pay rent to their old landlord. They were, therefore, entitled to remain in possession of the land. There was no reason why they should be ejected. Nothing they had done had worked a forfeiture. But the facts of the present case are quite different. The present plaintiff is not willing to pay rent to his landlord. On the contrary, he refuses to pay rent to him, alleges that the defendant is

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(1) (1883) I. L. B. 9 Calc. 648.

(2) (1897) 2 C. W. N. 63.

(3) (1904) 9 C. W. N. 379.

(4) (1906) 10 C. W. N. 1033.

(5) (1906) I. L. B. 33 Calc. 581.

(6) (1897) 2 C. W. N. 63.

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not his landlord, and that his old landlord, the defendant No. 1, must now take rent from his (the plaintiff's) transferee.

The case of *Mathur Mandal v. Ganga Charan Gope* (1) would seem to have no application. The case was remanded to have it determined whether Nidra Bewa had really abandoned the land. It was held that if the defendant was holding possession on behalf of Nidra Bewa, he could not be evicted. But there is no allegation in the present case that Bepin Krishna Roy is holding the land for the plaintiff, or in any other but his own right. The case of *Madar Mondal v. Mahima Chandra Mazumdar* (2) would seem at first sight to present some difficulty. In this case it has been laid down that where a tenant having a non-transferable right of occupancy sold such right to a third person, obtained a sub-lease from the purchaser and remained in possession of the land and was cultivating the same, the landlord is not entitled to khas possession against him.

In order to entitle a landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of section 87 of the Bengal Tenancy Act, namely, "that the raiyat voluntarily abandons his residence and ceases to cultivate without notice to the landlord and without arranging for the payment of his rent as it falls due." But on examining the judgment it will be seen that it no where expressly conflicts with the view we take of this case. In the judgment it is said: "In a case very similar to the present, *Dina Nath Roy v. Krishna Bejoy Saha*, (3) it was held that the landlord was not entitled to khas possession as against the original tenants, who were still on the land and were cultivating the same. A decree was passed against the purchaser defendants. It appears to us that the view taken in that case is correct and we accordingly follow it."

But in the case of *Dina Nath Roy v. Krishna Bejoy Saha*, (3) as has been pointed out, the original tenants the transferors, were quite willing to cancel the sale, to resile from their position as transferors and to revert to the old state of things, and again pay rent to their landlords. Hence, it was held that their landlord could not eject them. That as has already been pointed out is not the case in the present suit. Again in the judgment in *Madar Mondal v. Mahima Chandra Mazumdar* (2) it is said: "there can be no doubt that in order to entitle the landlord to re-enter on abandonment by the tenant, it must be an abandonment in the words of section 87, namely, that the raiyat voluntarily

(1) (1906) 10 C. W. N. 1083.

(3) (1906) J. L. B. 33 Calc. 581.

(2) (1904) 9 C. W. N. 379.

abandons his residence without notice to the landlord and without arranging for the payment of his rent as it falls due, and ceases to cultivate. In such a case the landlords' entry would be legal and he may then let out the land to another tenant or take it into cultivation himself." But it has already been decided that the provisions of section 87 are not exhaustive. The present case is not one of abandonment under section 87 of the Bengal Tenancy Act. It is not a case in which the plaintiff is willing to revert to the former state of things, to re-occupy the land and pay rent to the landlord as before. If this were the case, the decree of the lower Court would be right. But it is a case in which the plaintiff repudiated his relation of tenant, refuses to pay rent to him, maintains his right to transfer a non-transferable holding, and seeks to re-occupy the land not as his landlord's tenant, but as the under-tenant of a person who is not a tenant and has no legal connection with the land. The judgment in the case of *Madar Mondal v. Mahima Chandra Masumdar* (1) does not deal with or apply to such a case as this, and on the plaintiff's pleadings in this suit, we do not think he is entitled to the relief he has obtained or to any relief.

We therefore decree this appeal with costs.

A. T. M.

Appeal decreed.

(1) (1904) 9 G. W. N. 379.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

KRISHNA KINKAR DATTA AND ANOTHER

v.

MOHUNT BHAGABAN DAS AND OTHERS.*

Chaukidari Chakran (Act VI (B.C.) of 1870), Sec. 51—Chaukidari Chakran lands—Resumption, sublease before—Resumption, effect of—Zemindar—Chaukidar—Collector, lease by.

Where chaukidari lands are resumed by Government and settled with a zemindar, all rights created in such lands by the chaukidar in favor of third parties, come to an end; but if any transfer has been made by the zemindar before the resumption and the land is settled with him by the Collector, the transferee would be entitled to the benefits of such settlement.

If any transfer is made by the Collector, acting for and in behalf of the chaukidar, such transfer also ceases to have effect after the settlement.

Appeal by the Defendants.

Suit for possession of land on declaration of title.

* Appeal from Appellate Decree No. 209 of 1906 against the decision of Babu Umesh Chandra Sen, Subordinate Judge of Birbhum, dated 8th December, 1906, reversing that of Babu Durga Das Chakravarti, Munsiff of Rampore Hat, dated the 29th May 1905.

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November, 12.

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Krishna Kinkar
Duttav.
Mohunt Bhagaban
Daa.

Babus Digambar Chatterji and Gobinda Chandra Dey Roy
for the Appellants.

Babus Lalmohan Doss and Surendra Krishna Dutt for the
Respondent.

The facts and arguments necessary for this report appear
sufficiently from the judgment.

The judgment of the Court was as follows :

Mitra J.—The main question argued before us refers to the construction to be put on the last words of section 51 of Act VI (B. C.) of 1870. Under section 50 of the Act, the Collector is authorized to make a transfer of resumed chowkidari land to the zemindar. Section 51 says that the transfer shall be subject to the amount of assessment mentioned in the deed of transfer which is to be in the form prescribed in Schedule C of the Act and "subject to all contracts heretofore made in respect of, under, or by virtue of, which any person other than the zemindar may have any right to any land, portion of his estate or tenure, in the place in which such land may be situate."

The contention before us is that the words quoted above reserve the rights created by the chowkidar whose land is resumed in favour of a third person. We are of opinion that this contention is not sustainable. The words evidently refer to a contract made by the zemindar in respect of the village in which the chowkidari land or any portion of it is situated. This has been the view taken in a series of cases decided by this Court and the form as given in Schedule C conforms with the view that has been taken in these cases. The last words of the form are "subject to all contracts binding the said—in respect of any lands, portion of the said—situated within the said village." The section evidently refers to contracts in the nature of *putnis* or *mokararies* created by the zemindar himself in favour of third persons. If the transfer is made to the zemindar and the zemindar has already granted a sub-lease of the entire village including the chowkidari land, the sub-lessee would be entitled to the benefit of the transfer made by the Collector under the Act. It would go against the principle of the Act itself and the well-known status of chowkidars if we are to hold that the rights created by the chowkidar would subsist notwithstanding the transfer by the Collector by virtue of the provisions contained in section 51 of the Act. A chowkidar is in possession of chowkidari land for the purpose of certain services and his interest is limited to the period during which he serves the estate or the

zemindar. As soon as his service ceases, his right to the land ceases. The grantor ceasing to have right in the land, the grantee must necessarily cease to have right under any grant made by the grantor.

We are, therefore, of opinion that, both on principle and on the construction of section 51 of Act VI (B. C.) of 1870, the leases created by the chowkidar must be held to have ceased upon the transfer by the Collector of the land to the zemindar. Our judgment with respect to this point will cover both the plots A and B which are the subjects of dispute in this case.

As regards plot A, a further contention has been raised, namely, that the Magistrate of the district having granted a lease for 25 years in favour of the appellants, they are entitled to rely on that lease in any suit for ejectment by the transferee from the Government. It does not however appear that the Magistrate or the Collector had any power to grant such a lease and it would seem from the wording of the lease itself that the Magistrate or the Collector intended to act on behalf of the chowkidar. If that is so, the grant of a lease by the Magistrate or the Collector could not be of any use as against the transferee. The Magistrate or the Collector stood in the same position as the chowkidar himself. And then again if the lease be considered as one created by the chowkidar himself, the lease is void for non-registration inasmuch as it was executed after the Transfer of Property Act came into force. For these reasons, we are of opinion that this appeal must fail and it is accordingly dismissed with costs.

N. K. B.

Appeal dismissed.

Before Sir Francis W. Maclean K. C. I. E., Chief Justice and Mr. Justice Holmwood.

SURENDRA NATH SARKAR

v.

ATUL CHANDRA ROY AND ANOTHER.*

Equity—Minor—Principal and Agent—Accounts—Advances made by agent—Benefit of minor—Application of advances.

He who seeks equity must do equity.

When a minor on attaining majority comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian, the only person to whom he

* Appeal from Appellate Decree No. 1557 of 1905, against a decision of R. B. Pope, Esq. District Judge, 24-Pergunnahs, dated the 22nd May 1905, modifying that of Babu Bhagabati Charan Mitra, Subordinate Judge, dated the 16th August 1904.

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Mohunt Bhagabati
Daa.

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could make them as representing the minor—and these have been applied for the minor's benefit, the agent ought to be allowed those advances in taking the account.

Appeal by the Plaintiff.

Suit for accounts.

The material facts and arguments appear from the judgment.
Dr. Rash Behary Ghose and Babu Hari Charan Sarkhel for the Appellant.

Babus Lalmohun Doss, Ram Chandra Mazumdar, Jnanendra-nath Bose and Biraj Mohan Mojumdar for the Respondents.

The following judgments were delivered :

Maclean C. J.—This is a suit for an account by a principal against his agent. When the suit was instituted, the principal was a minor and the suit was by his mother as his next friend. He subsequently attained majority and elected to go on with the suit, and is the present appellant. A preliminary decree for accounts was passed and accounts were taken by a Commissioner. The matter then came before the Subordinate Judge, and he in effect affirmed the view of the Commissioner and found that a sum of Rs 4,581-1 anna was due from the plaintiff to the defendant instead of anything from the defendant to the plaintiff. The plaintiff then appealed to the District Judge, and his appeal was dismissed with costs. Hence the present appeal.

The first question that arises in the circumstances is whether certain advances made by the agent to the guardian of the minor which were found by both Courts to be expended for the benefit of the minor, can, in taking the accounts as between the plaintiff and his agent, be properly allowed to the agent. It is urged by the appellant that they cannot. As I have said, both Courts have found that these advances were made for the benefit of the minor. It is said that a guardian cannot bind his minor ward by a personal covenant, and reference is made to the case of *Waghela Rajsanji v. Shekh Masludin* (1), decided by the Privy Council. No body disputes that. But the question here is a very different one. The question here is, when a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking that account, that the agent has made certain advances to the guardian—the only person to whom he could make advances as representing the minor, and those have been applied for the benefit of the minor, whether the agent

(1) (1887) I. L. R. 11 Bom. 551.

ought not to be allowed those advances, in taking the accounts. I think he ought. Here the plaintiff seeks relief from a Court administering equity, and he must do equity himself. I think it is most equitable, when it is found that the minor has had the benefit of these advances, that they should be allowed to the agent, taking the accounts. I have, therefore, very little hesitation in saying, in the circumstances of this case, that the view taken by both the lower Courts as to the allowance of these sums was correct.

Then the second question is whether the Judge erred inasmuch on the ground that all these advances were not made for the benefit of the minor plaintiff. I thought at first there was something in that point; but when one looks at the judgment of the Subordinate Judge which has been accepted on this point by the District Judge, it is clear that all these sums were really advanced for the benefit of the minors. Had we thought otherwise, it might have been necessary to remand the case. Now that our attention is called to the finding of the Subordinate Judge, affirmed as it is by the District Judge, I do not think any remand is necessary.

The third point is whether a decree can be made in a suit for account, in favour of the defendant. I should have thought that it could. But this point has not been raised until the present moment; it was not raised in either of the Courts below nor is it made a ground of appeal, and I think it is too late to raise it now.

The only other question is as to costs. The Court below has exercised its discretion as to costs: and, upon the facts found as to the manner in which the defendant has been treated by the plaintiff, I think the conclusion at which the Court below has arrived is right.

The result, therefore, is that the appeal fails and must be dismissed with costs.

Holmwood J.—I agree.

N. K. B.

Appeal dismissed.

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March, 13.

Before Mr. Justice Rampini and Mr. Justice Wilkins.

SYED MAHAMMAD KHAN AND ANOTHER

v.

MAHARAJA NAM NARAIN SINGH BAHADUR.*

Grants, construction of—Secondary evidence—Evidence Act (I of 1872) Secs. 13, 65, 66 (2)—Judgments not inter partes, admissibility of—Board's letter—Recognition—Notice to quit.

Where a grant of land was made as a present for the purpose of planting a garden and another was made "subject to faithful service" and the documents of grants do not contain any words expressly limiting the grants to the life of the grantee nor making them descendible to the heirs of the grantee :

Held, they convey only life grants.

In a suit for *khas* possession on the ground that the defendants were trespassers on the death of their ancestor, the grantee, the plaintiff relied on office copies of grants kept in the course of business of the grantor's sherista :

Held, that no notice to the defendants to produce the original was necessary to render secondary evidence admissible as the defendant from the nature of the case, must have known, that they would be required to produce the originals.

Where judgments not *inter partes* were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee :

Held, they are admissible in evidence under the provisions of section 13 of the Evidence Act.

Board's letter dated the 26th November 1792 showing that jaigirs are resumable on the death of the grantee is inadmissible in evidence.

When the agent of the grantor, in ignorance of the death of the grantee, granted rent receipts to the heirs in the name of the grantee :

Held, the receipts did not recognize the heirs as tenants and successors of the grantee, and it was not necessary to give them notice to quit before bringing a suit against them.

Appeal by the Defendants 1 and 2.

Suit for *khas* possession.

The facts of the case appear sufficiently from the judgment.

Moulvies Serajul Islam and Mahammad Mustafa Khan for the Appellants.

Mr. P. O'Kinealy and Babus B asant Coomar Bose, Karuna Sindhu Mukerji and Jogendra Chunder Ghose for the Respondent.

The judgment of the Court was as follows :

This is an appeal against a decision of the Subordinate Judge of Hazaribagh, dated the 3rd of December 1897.

The suit is one for resumption. The plaintiff seeks to obtain from the defendants *khas* possession of $1\frac{1}{2}$ bighas of land in Purnea

* Appeal from Original Decree No. 59 of 1898 against the decree of Babu Atal Behary Ghose, Special Subordinate Judge of Hazaribagh, dated the 3rd December 1897.

Ichak and the entire village of Boondu with mesne profits after declaration of his ancestral right thereto. The plot of $1\frac{1}{4}$ bigha in Purna Ichak and the village of Boondu were admittedly granted to the maternal grandfather of the defendants by an ancestor of the plaintiff, according to the plaintiff, as life grants, but according to the defendants, as hereditary grants.

The learned Subordinate Judge has given the plaintiff a decree for all the reliefs claimed by him ; and the defendants Nos. 1 and 2 now appeal.

On their behalf the following pleas have been urged before us, *first*, that the documents on which the plaintiff relies to show that the grants of Purna Ichak and the village Boondu were only life grants (namely, Exhibit 1 and Exhibit 12) were only copies and not originals, and that, in the circumstances of the case secondary evidence of these grants is not admissible ; *secondly*, that these Exhibits are not genuine and that they contain no words purporting to make the grants conveyed by them grants for the lifetime of the grantee only ; *thirdly*, that the defendants have established the genuineness of the document (Exhibit A) upon which they rely ; *fourthly*, that as the defendants have been recognized as tenants of the land after the death of their ancestor, Saheb Zaman Khan, they cannot be ejected without service of notice to quit on them ; and, *fifthly*, that no decree for mesne profits should be given against them.

With regard to the first of these pleas, we would say that we think that in this case the documents, Exhibit 1 and Exhibit 12, *are* admissible in evidence, although they only purport to be copies of the original grants. They are shown to be office copies, kept in the ordinary course of business of the Rajah's *serishta*, of grants made to the defendants' ancestor, Saheb Zaman Khan. It is true that no notice to produce the originals of these copies was given to the defendants ; but it appears to us that secondary evidence is still admissible of the grants, under the provisions of section 66, proviso 2, of the Indian Evidence Act. The defendants must have known, from the nature of the case, that they would be required to produce the originals of these grants ; and, if any such exist, they must undoubtedly be in their possession. But the defendants do not admit that there are any such originals in existence, or in their possession. They maintain that no such original grants were ever issued to their ancestor ; and, according to their case, the original documents, Exhibit 1 and Exhibit 12, are not mere copies, but are forgeries, purporting to

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be copies of originals which never existed. In these circumstances, we do not think it was necessary for the plaintiff to call upon them to produce the originals of these documents, the existence of which they deny; and, in the absence of such notice, the documents (Exhibit 1 and Exhibit 12) are perfectly admissible in evidence.

The next point is whether they are genuine and whether they convey to the grantee a life grant only, or an hereditary grant, of the properties to which they relate. We have no doubt whatever of their genuineness; and their genuineness is proved in this case by the evidence of several witnesses who speak to the hand-writing of the persons who wrote them, and who are now shown to be dead.

The documents bear date 1842 and 1869, so that the former at least can be presumed to have been duly executed, although evidence of their execution is not given. Exhibit 1 is proved by the evidence of two witnesses (whose depositions appear at pages 7 and 9 of the paper book) to be in the hand-writing of one Aubach Lal. Exhibit 11, which is a copy of the *sanad* of mouza Rochak, is proved to be in the hand-writing of Harbans Ram; and Exhibit 12, which is the grant of the village of Boondu, which was subsequently given to Saheb Zaman Khan in lieu of the village of Rochak, which was resumed by the Rajah, is proved to be in the hand-writing of Hari Das. Furthermore, these exhibits are shown to bear the initials of Colonel Money, who was manager of the Court of Wards when the Rajah's estate came under the management of that department. His initials have been established to our satisfaction by the evidence of several witnesses; and he endorsed them with his initials in 1873, that is, nearly 27 years ago: so that these documents must have been in existence from that date. Moreover they are shown to have been filed in previous suit in Court. For all these reasons, therefore, we think there can be no doubt whatever of their genuineness. Then, it is true that the documents which relate to the properties in dispute (namely Exhibit 1 and 12) do not contain any words expressly limiting the grant to the life of the grantee. But, on the other hand, they contain no words making the grants descendible to the heirs of the grantee; and we think, from the terms of the documents, that they convey only life-grants. The first document, Exhibit 1, purports to convey one and one quarter bighas of land in Purna Ichak to Saheb Zaman Khan, as a present for the purpose of planting a garden.

This would seem to be a grant of land for a purpose which could only be carried out during the lifetime of the grantee. Similarly, Exhibit 12 purports to convey the village of Boondu to Saheb Zaman Khan "subject to faithful service." We think that these words clearly convey the idea of a grant for the life of the grantee only; and, as has already been said, there are no words in either of these documents which in any way make the grant descendible to the heirs or other descendants of the grantee. Then, there is oral evidence in this case to show that such grants were frequently resumed by the Maharajah on the death of the grantee. There are also a considerable number of judgments filed by the plaintiff, and on which the Subordinate Judge relies, showing that in similar cases similar grants were resumed by the Maharajah or his heirs on the death of the grantees. We think that these documents are admissible in evidence under the provisions of section 13. But the conclusion that we come to in this case is arrived at quite independently of these documents. The Subordinate Judge has referred to the Board's letter, dated the 26th November 1792, which, he says, shows that such *jaigirs* are resumable. We, however, do not consider that this letter is admissible in evidence or should in any way be regarded as establishing this point. The letter only records the opinion of the Board on the matter; and we do not think we should take that as any guide to us on the subject.

The next point is whether the *sanad*, which has been filed by the defendant in this case, and which has been marked Exhibit A is genuine or not. This *sanad* purports to bear date 1919, corresponding with the 17th of April 1862. But, in the first place, it was filed in somewhat suspicious circumstances. It was not filed along with the written statement, but only at a very late stage of the case, namely, on the 3rd of December 1896. The defendants' written statement contains no mention of it, and, when it was filed, it was filed in a sealed cover, as if the defendants wished to conceal its appearance and contents from the plaintiff. Then, we do not consider that its genuineness has been established in this case. There is no evidence, which we can regard as satisfactory, showing that it was written by the person by whom it purports to have been written, namely, Jai Kissen Das. On the contrary, the son of Jai Kissen Das, who has been examined as a witness on behalf of the plaintiff, denies that this document is in his father's hand-writing. Then we are not at all satisfied that it was even filed in any previous

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suit, as it purports to have been filed. It purports to have been filed in the suit of *Ram Narain Singh v. Bhawani Ram*. Now, no papers have been produced to show that there was any such suit, or that this *Sanad* was ever filed in such suit; and the defendant himself in his evidence (printed at page 63 of the paper-book) declares that it was filed in a perfectly different suit, namely, in the suit of *Jhabhoo Ram v. Rajah Nam Narain Singh*. And, again, there is no evidence to show that the *Sanad* was ever filed in the suit of *Jhabhoo Ram v. Rajah Nam Narain Singh* or, indeed, that there was ever any such suit. Then, the endorsements on the back of the document purport to have been signed by a copyist, Achambit Lal, by Nand Kishore, and by Ram Coomar Chakravarti; and we do not consider that the signatures of these persons have in any way been satisfactorily established in this case. Achambit Lal moreover, is shown not to be a copyist, but a decree-writer; and it would not be any part of his duty to handle this document, or to make any such endorsement on the back of it. Further more, we notice that the seal on the face of this document, which purports to be the seal of the Rajah, is a little larger than the impressions of the seals on the documents, Exhibits 1 and 2, which have been established to our satisfaction to be the genuine impressions of the Rajah's seal. We have, therefore, no hesitation in concurring with the view taken by the Subordinate Judge in this case, that the document, Exhibit A, is not a genuine document but a spurious and forged one. We may add the document, Exhibit A contains the words "*alaulad*," so it would seem as if these words were essential in a grant to import heredity.

The next point is as to whether it was necessary for the plaintiffs to have given the defendants any notice to quit before bringing this suit for ejectment against them. We agree with the Subordinate Judge in thinking that such notice was not necessary. There are no doubt, three rent receipts filed in this case, namely, C, C 1 and C 2, which show that the rent must have been received by the Rajah, or his employees, shortly after the death of the defendant's maternal grandfather, Saheb Zaman Khan; but, in our opinion, these receipts do not show any recognition on the part of the plaintiff, or his predecessor, of the defendants as successors of Saheb Zaman Khan. In the first place, Rangu Lal Tahsildar, who gave the receipt C 2, was not an agent of the Rajah at all. He was the Government Road-cess tehsildar; and he gave this receipt, C 2, at a time when the Rajah's

estate had been attached for road-cess. Then, this receipt was not given to the grantee, but was given in the name of Saheb Zaman Khan, and the witness says that when he granted it, he had no knowledge of the death of Saheb Zaman Khan. Then the next witness is Jagannath Modi. He was, no doubt, an agent of the Maharajah ; but the receipt he gave was not in the name of the grantee, but in the name of Saheb Zaman Khan, and he, too, says he does not remember, when he gave this receipt, whether Saheb Zaman Khan was dead or not. The third receipt C 1, was given by the witness Sheo Narain Lall Sett. This receipt too was given in the name of Saheb Zaman Khan, and not in that of the grantee, and the witness admits that he had no power "to declare any one as heir without permission" and he had "no permission to effect mutation of name." We, therefore, do not think that these three receipts establish the allegation of the defendants that they were recognized as tenants and as successors of Saheb Zaman Khan after the death of their maternal uncle ; and we concur with the view of the Subordinate Judge that it was not necessary to give them notice to quit before bringing the suit against them.

The last point is as to whether the defendants are liable for mesne profits or not. We think, in the circumstances of the case, that they are liable for mesne profits. They were never recognized by the plaintiff as tenants of the land ; and no rent was received from them in recent years. The last rent taken from them was in 1888 and then it was taken only as from the original grantee. Since then no rent has ever been received from them. Therefore, we think that they must give up possession and that they are liable for the mesne profits allowed by the Subordinate Judge.

For these reasons we dismiss this appeal with costs.

A. T. M.

Appeal dismissed.

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May, 29.

Before Mr. Justice Holmwood and Mr. Justice Sharfuddin.

NANDA LAL MUKHERJI AND ANOTHER

v.

SADHU CHARAN KHAN AND OTHERS.

Bengal Tenancy Act (VIII of 1885), Sec. 148—Suit for rent—Aggregate rent—Aggregate area—Single suit—Maintainability of suit—Execution of decree.

A landlord is entitled to bring one suit for the total rents of three separate holdings giving the total area as the sum of the three holdings. He is not bound to bring three separate suits.

The suit is maintainable, though the landlord may have difficulty in executing the decree obtained in it under the special procedure prescribed in the Bengal Tenancy Act.

Hridaynath Das v. Krishna Prasad Sircar (1) followed.

Appeal by the Plaintiffs.

Suit for rent.

The material facts and arguments appear from the judgment.

Babu Basanta Kumar Bose for the Appellants.

Babu Sarat Chandra Dutt for the Respondents.

The judgment of the Court was delivered by

Holmwood J.—We are of opinion that this appeal must be allowed and the judgments of the two lower Courts reversed.

The question of law which was held to operate as a bar to the plaintiffs' suit in the lower Court appears to us to be a highly technical one; and there is authority for holding that such a suit as the present may lie and a decree for money claimed may be passed, although there may be difficulty in executing the decree under the provisions of the Bengal Tenancy Act.

The plaintiff sued for the rent of a holding for which he gave the area as 12 bighas odd and jama as Rs. 25-8 odd. The defendants pleaded that there were three jamas or three holdings; it is not quite clear whether they were *raiya* holdings or whether they were tenures. Be that as it may, they are fully described by metes and bounds as three separate parcels in the schedule attached to the plaint, and that being so, section 148 of the Bengal Tenancy Act has been sufficiently complied with.

The question now is, can the landlord sue for the sum of the rent made up of the rent of three separate holdings giving the total area as the sum of the area of the three holdings; or is

* Appeal from Appellate Decree No. 540 of 1906, against a decision of Babu Dinanath Sarkar, Subordinate Judge of Hooghly, dated the 22nd December 1905, affirming that of Babu Sarat Chandra Ghose, Munsiff of Amta, dated the 26th April 1905.

(1) (1907) I. L. R. 34 Calc. 2: 8.

he bound to bring three separate suits? The matter was considered in the case of *Hridaynath Das Choudhury v. Krishna Prasad Sircar* (1) where Mr. Justice Mitra and Mr. Justice Caspersz hold: "the inclination of our mind is that such a suit is maintainable and that a decree that may be passed in such a suit is a good decree capable of execution in the ordinary way under the Code of Civil Procedure as a decree passed against the tenant defendant." Then they go on to point out the difficulty which will meet the landlord if he tries to execute the decree under the provisions of the Bengal Tenancy Act. Then they speak of the special provisions relating to sales for arrears of rent. As regards the payment and receipt of rent, there is nothing, they say, to prevent the landlord from proceeding under the ordinary law. In the latter part of their judgment they seem to point out more clearly that "it may be competent to the landlords to institute a suit for the rent of several tenures or holdings, but it is a different thing as regards sales under the special provisions of the Rent Act."

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What we are concerned with in this case is whether the suit is maintainable or not. Were the matter *res integra*, speaking for myself, I should be inclined to hold that such a suit is maintainable, and I think we may safely follow the *dictum* of this Court in the case just referred to, and for this reason the judgment of the Subordinate Judge declaring the suit to be not maintainable must be reversed.

Then, another objection is taken that the Munsiff was wrong in deciding that the suit was not bad for defect of parties. It appears to us that any such objection ought to have been taken before the Subordinate Judge. No attempt was made to take any objection of this kind. There is nothing in the Subordinate Judge's judgment to show that there was any objection. The recorded tenants had been sued and if they had any brother or a joint sharer in the tenancy, they were held by the Munsiff to be equally liable, and no appeal was urged on this point before the lower appellate Court. There is, therefore, nothing in this objection.

For the reasons already given, we set aside the judgment and decree of the learned Subordinate Judge in the Court below and direct, that the case be remanded to the lower Court for determination of the 2nd and 3rd issues raised in the case and for disposing of the suit on the merits.

The costs of this appeal will abide the result.

N. K. B.

Appeal allowed.

(1) (1907) I. L. R. 34 Cal. 298.

*Before Sir Francis W. Maclean, K.C.J.E., Chief Justice and
Mr. Justice Geidt.*

KALI KUMAR MUKHERJI

v.

BRAHMANANDA MUKHERJI AND OTHERS.*

*Civil Procedure Code (Act XIV of 1882), Sec. 331—Resistance or obstruction—
Decree for partition—Decree for possession—Partition Act (IV of 1891),
Sec. 4.*

Where a person is held entitled to the possession of a share in certain property after partition, and a Commissioner is appointed to partition the property and put him in possession of his share, resistance to such Commissioner is 'resistance or obstruction,' within the meaning of section 331, of the Code of Civil Procedure to a decree for possession.

It is only when the suit is for partition, that a member of the joint family may buy out the plaintiff, under section 4 of the Partition Act. He is not entitled to do so when the suit has been decreed and the decree for possession is being executed.

Gopala v. Fernandes (I) followed.

Appeal by the Defendant.

Execution of a decree for possession.

The facts and arguments appear sufficiently from the judgment.

Babus Nilmadhub Bose and Jadu Nath Kanjilal for the Appellant.

Babu Jogesh Chandra Roy for the Respondents.

The following judgments were delivered :

Maclean C. J.—Three points have been raised upon this appeal, but none of them, to my mind, raises any very serious difficulty.

The first point taken which goes to the root of the matter is that the proceeding under section 331 of the Code of Civil Procedure is one that could not properly be taken under that section. We are invited to say, that these proceedings which, I notice, have been going on since the 7th of December 1903, are to be treated as a mere nullity, and the respondent on this appeal is to be put to the worry and the cost of bringing a suit to determine the very question which after careful trial has been determined under these proceedings. I should be very loath to

* Appeal from Appellate Decree No. 639 of 1906 against the decision of Babu Satya Charan Ganguli, Subordinate Judge, Jessore, dated 19th January 1906, modifying that of Babu Netai Churn Ghose, Munsiff of Narail, dated the 3rd April 1906.

accept that view, and shall not do so unless the language of the Code is such that I am bound to do so : but I do not take that view. What happened was this : In a previous suit in which judgment was ultimately given by the High Court, the present plaintiff established his right to one-third share of the property in question and was held entitled to possession of that, after partition. Having obtained that decree, he proceeded to execute it by having a Commissioner appointed to partition the property, so that he might obtain possession of his one-third. The Commissioner was resisted and obstructed by the present appellant who was not a party to the previous suit, and has, in consequence, been unable to proceed with the partition : consequently, these proceedings were taken under section 331. The argument is that this was not a case of resistance or obstruction to the execution of a decree for the possession of property." It is contended that the words in section 331 "if the resistance or obstruction" must refer back to the words in section 328, *viz.*, "resistance or obstruction to the execution of a decree for possession." That I think is so. Under the decree of the High Court, the plaintiff was held entitled to possession ; but he could not obtain possession until his share had been ascertained by partition and to do that the Commissioner was appointed with the object of the plaintiff obtaining possession under the decree. The appellant resisted and obstructed him in that, and I think, that clearly was a resistance and obstruction to the execution of the decree for possession. By obstructing the Commissioner, the appellant prevented the plaintiff from executing his decree for possession. It would be a very narrow construction of the language of these two sections to hold otherwise. I find, if authority were needed, that this point was expressly decided in the case of *Gopala v. Fernandes* (1). I may point out that this is an objection of the most technical nature, for the appellant admittedly has not been in the slightest degree injured or even prejudiced by the course which has been taken, the proceeding under section 331 being treated and registered as a suit between the decree-holder as plaintiff and the claimant as defendant, and the claim being investigated in the same manner as if a suit had been instituted. I, therefore, have no hesitation in overruling the first point.

The second point is that the Court did not properly try the question of title in the sense that it would have tried it in a

(1) (1892) I. L. R. 16 Mad. 127.

CIVIL.

1907.

Kali Kumar
Mukherji

v.
Brahmananda
Mukherji.

Maulean. C. J.

CIVIL.

1907.

Kali Kumar
Mukherjiv.
Brahmananda
Mukherji.

Maclean, C. J.

regular suit. There is nothing in this contention. The Court did go into the matter and the appellant had every opportunity of showing that the plaintiff was not entitled to this one-third share. The High Court, on admissions of the other parties (exclusive of the appellant who was, of course, not bound by them) had previously held that the plaintiff was entitled to a one-third share. I think there is no foundation for saying that the case was not properly tried.

The last point is that the appellant is entitled, having regard to the language of section 4 of the Partition Act to buy out the share of the present plaintiff. Admittedly, the present plaintiff is not a member of an undivided family and a share has been transferred to him, he not being such a member. But two questions arise : (1) Is the present suit a suit for partition ? (2) Is the present appellant a member of the family ? It is only in the event of the suit being one for partition, and the person desirous of buying being a member of the family, that the privilege conferred by section 4 can be rendered available. When we look at the suit, it is certainly not a suit for partition. This is a suit brought, in order that effect may be given, by execution, to the previous decree of the High Court for possession ; and, that is all that has been done. Therefore, the case does not fall within the section. But apart from that, there is no finding here that the present appellant can be properly called a member of an undivided family within the meaning of the section. It seems to me, therefore, that on both points the appellant, so far as he seeks to be entitled to buy out the plaintiff, fails : and, this was the view taken by the lower appellate Court, that the appellant has really nothing to complain of and the appeal must be dismissed with costs.

Geidt J.—I agree.

N. K. B

Appeal dismissed.

Before Mr. Justice Rampini and Mr. Justice Mookerjee.

KARTIK SAHU

v.

NILAMBAR SINGH AND OTHERS.

CIVIL.

1906.

November, 28.

Execution of mortgage decree—Decree directing sale of nij jote lands mortgaged—Mortgagor-judgment-debtor, if competent to raise the question of the saleability of the jotes, in execution—Saleability or otherwise of nij jote lands, onus of proof of—(Regulation III of 1872), Sec. 11—Sonthal Pergunnahs Regulations—Settlement Court, decisions of—Suit, maintainability of.

Where a mortgage decree distinctly provides for the sale of certain *nij jote* lands mortgaged and directs that the mortgage debt must be realized, in the first instance, by the sale of the mortgaged property, it is not open to the mortgagor-judgment-debtor to object to the execution of the decree on the ground that the *jotes* are not saleable.

The onus is not on the decree holder, in such a case, even if it were open to the judgment debtor to raise the question of the saleability of the *jotes* to shew that the *jotes* are saleable, but on the judgment-debtor to prove that the *jotes* are not saleable.

In the absence of a decision of any Settlement Court or of a decision by any Civil Court on the question of the transferability of these *jotes*, a suit for the sale of such *jotes* mortgaged does lie in the Civil Court.

Appeal by the Decree-holder.

Application for execution of a mortgage decree directing the sale of some *nij jote* lands (in Sonthal Pergunnahs, Dumka,) mortgaged.

The facts of the case appear from the judgment.

Babu Hara Prasad Chatterjee for the Appellant.

Babu Jogendra Chandra Ghose for the Respondent.

The judgment of the Court was delivered by

Rampini J.—This is an appeal against an order of the Subordinate Judge of Dumka, dated the 16th March 1905.

The facts are these. The present appellant obtained a mortgage decree for the sale of the *mokarari* right, title and interest of Narbhai Singh and others in Mehal Motihari, consisting of 9 mouzahs and of their *nij jote* in Motihari. The mortgage decree was to the effect that the debt was to be realized, in the first instance, by the sale of the mortgaged property; and among these properties was a certain *jote* described as 42 *bighas* of paddy land in *nij jote*, which were under mortgage by a bond, within certain specified boundaries. On the decree-holder applying for execution of his decree, the judgment-debtors

* Appeal from Original Order No. 288 of 1905, against an order of W. H. Thomson, Esq., Subordinate Judge of Dumka, in Sonthal Pergunnahs, dated the 16th March 1905.

CIVIL.

1906.

Kartik Sahu
v.
Nilambar Singh.
Rampini, J.

objected that the property could not be sold. A petition was also put in by certain zemindars who said that the property could not be sold without their permission.

The learned Subordinate Judge then said "I have been through the settlement *jamabandi* and do not find that the jotes under reference are saleable. I, therefore, refuse to move the Deputy Commissioner to sanction sale. The execution is struck off."

The decree-holder appeals against this order; and his objections are two-fold; namely, *first*, that under the terms of the mortgage-decree, the judgment-debtor cannot object to the sale of the property he now seeks to sell, and *secondly*, that the finding of the Subordinate Judge is not sufficient, inasmuch as he does not say that it is recorded in the settlement *jamabandi* that the *jotes* are not saleable, but simply that he does not find that they are saleable.

In our opinion, both these grounds of appeal must prevail.

The mortgage-decree most distinctly provides for the sale of the *jotes* in question and declares that the mortgage debt must be realized, in the first instance, by the sale of the mortgaged property.

It, therefore, does not lie in the mouth of the judgment-debtors to object to the execution of the decree on the ground that the *jotes* are not saleable.

Then, the Subordinate Judge has not pointed out that the settlement record shows that the *jotes* are not saleable, but he says he cannot find that the *jotes* are saleable.

The pleader for the judgment-debtors, respondents, refers to section 11 of Regulation III of 1872, in which it is provided that "except as provided in section 25, no suit shall lie in any Civil Court regarding any matter decided by any Settlement Court under these rules."

All we have to say is that no decision of any Settlement Court has been produced in the suit. Nor does it appear that the question of the transferability of these *jotes* has been decided by any Civil Court.

We must, therefore, set aside the order of the lower Court and direct that execution of the decree do proceed.

We observe, as already mentioned, that certain zemindars have objected to the sale of the property. They say that the property cannot be sold without their permission, and that they do not agree to the sale of the land.

The property must, therefore, be sold subject to this objection of the zemindars, and whoever purchases it must take it with notice of this objection.

This appeal is accordingly decreed with costs, which we assess at five gold mohurs.

B. M.

Appeal decreed.

*Before Sir Francis W. Maclean, K.C.I.E., Chief Justice and
Mr. Justice Geidt.*

SAMBHU CHANDRA HAZRA

v.

PURNA CHANDRA PAL AND OTHERS.*

Bengal Tenancy Act (VIII of 1885), Secs. 105, 106, 108, 109A(3)—Record of rights—Final publication—Settlement Officer, jurisdiction of—Alteration of entry without presentation of plaint—Decision settling rent—Appeal.

A draft record-of-rights was published on the 31st March 1903, the parties being asked to lodge their objections, if any, within one month. No objection was lodged and the record was finally published on the 9th June 1903. The Settlement Officer then proceeded to settle fair and equitable rents, and on an application by the tenants, dated 14th August 1903, altered the record as regards some of them entering their lands as 'lakheraj' instead of 'mal.' He refused their prayer to be recorded as raiyats at fixed rates of rent. He also imposed a limitation as regards enhancement of rent :

Held, that the Settlement Officer had no jurisdiction, in the absence of the presentation of a plaint on a regularly stamped paper, to make the alterations in the record.

Held further : that as regards the limitation to enhancement, no appeal lay to the High Court as it was a "decision settling rent."

Appeals by the landlord as well as by the tenants.

Proceedings for record-of-rights.

Babu Sharat Chandra Roy Chowdhry for the Appellant.

Babu Nagendra Nath Ghose for the Respondents.

The material facts and arguments appear from the judgment.

C. A. V.

The judgment of the Court was as follows :

Maclean C. J.—These appeals arise out of Settlement proceedings initiated by the landlord who applied for the preparation of a Record of rights. An enquiry was held by the Settlement Officer and a draft Record of rights published on the 31st

* Appeals from Appellate Decree Nos. 1033 and 1081 of 1905 against the decision of G. K. Deb, Esq., Special Judge of Hooghly, dated 30th January 1905, confirming that of Babu Pramatha Nath Dutt, Settlement Officer of Uluberiah, dated the 22nd December 1903.

CIVIL.

1906.

Kartik Sahu
v.
Nilambar Singh.

Rampini, J.

CIVIL.

1907.

November, 11, 12, 25.

November, 25.

CIVIL.

1907.

Sambhu Chandra
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Purna Chandra Pal.

Maclagan, C. J

March 1903, the parties being informed that the Record would be open for inspection, and that objections would be received within one month. No objections were preferred, and on 9th June 1903 the Record of rights was finally published. The Settlement Officer then proceeded in accordance with the landlord's application, to settle fair and equitable rents, and on 14th August 1903, the tenants, who had been recorded as settled raiyats holding mal lands, put in a petition objecting that some of their lands recorded as mal were lakheraj, and that their status was that of raiyats holding at a fixed rent. The Settlement Officer on enquiry gave effect to the first of these objections, and altered the entry in the Record of rights, recording as lakheraj, lands which had been put down as mal. As regards the second objection, the Settlement Officer held that the raiyats had not proved that they had held lands at a uniform rate of rent since the Permanent Settlement. The Settlement Officer's orders on these points were upheld by the Special Judge on appeal.

In appeal No. 1033 which is by the landlord, it is objected that the Settlement Officer was not competent to revise the entries relating to mal lands. The Special Judge has held that section 108 of the Bengal Tenancy Act gives the Settlement Officer power to alter these entries. That section provides that a Revenue Officer... "may on application or of his own motion within twelve months from the making of any order or decision under section 105, section 106, or section 107 revise the same." It seems clear to us that the entry as to mal lands was not made under any of the sections mentioned. Section 105 refers to the settlement of fair and equitable rents. Section 106 relates to the decision of disputes regarding entries in the Record of rights. These disputes can only be decided by the presentation of a plaint on stamped paper. No such plaint had been presented, nor had the Settlement Officer professed to settle any such dispute under section 106. Section 107 merely refers to the procedure to be adopted under the two preceding sections and directs the Revenue Officer to make in the Record of rights a note of all rents settled under section 105 and of all decisions of disputes passed under section 106. It appears to us, therefore, that section 108 did not warrant the Settlement Officer in revising his entries as to mal lands in the Record of rights. The Act gives to tenants ample opportunity for the correction of mistakes in that Record. The draft Record is prepared in the presence of landlord and tenant. The draft is then published, and objec-

tions to any entries therein are invited and considered before it is finally published. A still further opportunity is afforded even after final publication by section 106, which allows the parties to institute before the Revenue Officer a suit for the decision of any dispute regarding the entries. In the present case, the tenants made no objection to the draft Record, nor did they after final publication institute any suit regarding the mal lands. The Settlement Officer had no authority to revise the entries regarding mal lands in the Record of rights, and his orders on this point must be set aside.

Another objection taken in the landlord's appeal is in regard to the limitation of enhancement of rent imposed by the Settlement Officer who has directed that the rent shall not be enhanced, so as to be in excess of one and-a-half times the existing rent. It is urged that such a limitation is inequitable in cases where the tenant is holding an area in excess of that on which his existing rent was fixed. We are however unable to entertain this objection, as the order complained of is a decision settling a rent, and on such a point no second appeal lies. See section 109a (sub-section 3) of the Bengal Tenancy Act.

In appeal No. 1081 preferred by the tenants, the sole ground urged is that the Settlement Officer was wrong in deciding that their status was not that of tenants holding at fixed rents. For the reasons already given in a former part of this judgment regarding mal lands, we are of opinion that the Settlement Officer had no power to entertain their objection as to their status. Their status had been recorded in the draft Record as that of settled raiyats. No objection to this entry was made before final publication, nor was any plaint presented to the Settlement Officer for a decision of a dispute on this point.

The result is, that the landlord's appeal No. 1033 succeeds in part. The entries in regard to lakheraj lands must be expunged, and the lands entered as mal. In this appeal we direct that each party bear his own costs.

Appeal No. 1081 fails and is dismissed with costs.

N. K. B.

Appeal No. 1033 decreed in part.

Appeal No. 1081 dismissed.

CIVIL.

1907.

Sambhu Chandra
Hazra

v.
Purna Chandra Pal.

Maclean, C. J.

Before Mr. Justice Mitra and Mr. Justice Ormond,

ISWARDHARI SINGH AND OTHERS

v.

RAM BRICH ROY AND OTHERS.*

CIVIL.

1906.

April, 2.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2 (b)—Limitation of rent suits—Fuslee year—Rent due on the last day of Bhadra—Period of limitation.

The period of limitation where the Fuslee year prevails is three years from the last day of Jeith. If any instalment is due on the last day of Bhadra, the period of limitation will expire on the last day of Jeith in the third subsequent year, so that in such a case, the suit must be brought not within three years but within two years and nine months.

Appeal by the Plaintiffs.

Suit for rent.

The facts and arguments appear sufficiently from the judgment.

Babu Kshetra Mohun Sen for the Appellants.

Babu Sorashi Charan Mitra for the Respondents.

The judgment of the Court was delivered by

Mitra J.—The defendants were holding lands under a lease which terminated in the year 1306 F. The present suit was instituted for recovery of the arrears of the year 1306. The rent was payable in four instalments, in Pous, Chait, Jeith and Bhadra, and the amount sued for with interest is Rs. 270.

The suit was instituted on the 7th July 1902, more than three years after the end of Jeith 1306, and the question has arisen whether the suit was within time calculating the period of limitation according to Article 2 (b) of the third Schedule of the Bengal Tenancy Act. The Fusli year prevails in the District of Chapra where the land is situated, and according to law, three years must be counted from the last date of the month of Jeith F, when the arrear fell due during the year 1306. The arrear undoubtedly fell due in 1306. The arrear of the Bhadra instalment fell due subsequent to Jeith of the year 1306, but the word *arrear* in clause (b) has been construed in the case of *Kashikant Bhattacharji v. Rohini Kant Bhattacharji* (1) as *rent in arrear*. According to section 54, the amount of the Bhadra instalment was payable by the sunset of the last day, and

* Appeal from Appellate Decree No. 2501 of 1903 against the decision of Babu Gopi Krishna Banerji, Subordinate Judge of Saran dated the 22nd August 1903 reversing that of Babu Ambika Charan Mojumdar, Munsiff, Chapra, dated the 16th February 1903.

it became arrear after sunset. The rent was payable within Bhadra, and therefore it cannot be contended that the rent became due after the year 1306. If it fell due within the year 1306, the law expressly lays down that the suit must be brought within three years of the Jaith of the year in which it fell due. The period of limitation is thus not three years but 2 years and 9 months. We cannot help it. That is the view taken by the lower Courts, and we are of opinion that that is the right view under the law.

It has been contended that the Bengal Tenancy Act does not govern the case. The defendants were holding land which was agricultural. The defendants were farmers or thikadars. Their case should be governed by section 66 of the Bengal Tenancy Act and the amount they were bound to pay under the contract is within the definition of rent.

The contention, therefore, of the appellants fails and this appeal is accordingly dismissed with costs.

N. K. B.

Appeal dismissed.

Before Mr. Justice Rampini and Mr. Justice Mookerjee.

RAM CHARAN NASKAR

v.

HARI CHARAN GUHA.*

Ejectment, suit for—Notice to quit—Tenant-at-will—Agricultural holding—Transfer of Property Act (IV of 1882), Sec. 108, cl. (7)—Trespasser, notice addressed to tenant as, if legal.

The incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands, created before the passing of the Transfer of Property Act in the absence of a custom to the contrary.

Madhab Chandra Pal v. Bejoy Chand Mahatab (1), and *Madhu Sudan Sen v. Kamini Kanta Sen* (2) followed.

A notice addressed to a tenant, not as a tenant but as a trespasser, giving him six months' time to quit, even if the tenancy was created after the passing of the Transfer of Property Act, is a good notice and the defendant is bound to quit the land in accordance with such notice.

Appeal by the Defendant.

Suit for ejectment on notice to quit.

The facts of the case, material to this report, appear from the judgment.

* Appeal from Appellate Decree No. 808 of 1905, against the decree of Babu Akshoy Kumar Bose, Subordinate Judge of Hooghly, dated the 26th January 1905, affirming a decree of Babu Chandra Bhusan Banerjee, Munsiff of Howrah, dated the 25th February 1904.

(1) (1900) 4 C. W. N. 574.

(2) (1905) I. L. R. 32 Cal. 1023.

CIVIL.

1906.

Iswardhari Singh

v.

Ram Brich Roy.

Mitra, J.

CIVIL.

1906.

March, 28.

CIVIL.

1906.

Ram Charan Naskar

v.

Hari Charan Guha.

Babu Mahendra Nath Roy for the Appellant.*Babu Mahendra Kumar Mitra* for the Respondent.

The judgment of the Court was delivered by

Rampini J.—The suit out of which this appeal arises is one brought by the plaintiff to eject the defendant No. 1 from a plot of land in Ghosuri within the Municipality of Bally after notice to quit.

The facts are that the land was used for a long time for non-agricultural purposes. It is found that the provisions of the Bengal Tenancy Act do not apply to it. It has been further found by the lower appellate Court that Durgaram was formerly in possession of this land. He is said to have had a permanent transferable right under a pottah granted to him on the 16th Bhadra 1265. Defendant No. 1 is the purchaser from the mortgagee of Durgaram who caused the land to be sold in execution of his decree. He is now in possession of the land.

The lower appellate Court has found that Durgaram was a mere tenant-at-will and that he had no permanent transferable interest in the land, and, therefore, defendant No. 1 is in the position of a trespasser. It has, therefore, found that the defendant No. 1 is not entitled to a notice to quit. But the plaintiff has given him a notice to quit and the Subordinate Judge has found that it was valid and was duly served. The defendant No. 1 appeals.

It is contended that he is a tenant and, therefore, he is entitled to a notice and that the notice is bad. We think that there is no force in this. The learned pleader for the appellant has argued that although the tenancy was created before the passing of the Transfer of Property Act, still the law before the passing of the Transfer of Property Act is the same as that after the passing of the Transfer of Property Act, and, therefore, the provisions of section 108 Cl. (7) of the Transfer of Property Act apply. We think that this plea cannot be sustained in the face of the rule laid down in *Madhab Chandra Pal v. Bejoy Chand Mahatab* (1) and *Madhu Sudan Sen v. Kamini Kanta Sen* (2) in which it has been held that the incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands created before the passing of the Transfer of Property Act, in the absence of a custom to the contrary.

Then it has been said that the lower Court has not found whether the tenancy was created before or after the passing of

(1) (1900) 4 C. W. N. 574.

(2) (1905) I. L. R. 32 Calc. 1023.

the Transfer of Property Act. We think that this is immaterial, for if the tenancy was created after the passing of the Transfer of Property Act, and the provisions of section 108 clause (7) do apply, still the plaintiff clearly served a notice to quit which is quite sufficient to justify the decree he obtained. This notice was a six months' notice, and the learned pleader for the appellant has argued that this is not a good notice, because it was addressed to the defendant as a trespasser and not as a tenant ; therefore he is not bound to take notice of it. But whatever the statement made in the notice as to the defendant's title may be, it clearly gives him six months' time to quit. That being so, whether the tenancy was created after the passing of the Transfer of Property Act, he is bound to quit the land in accordance with the notice. We, therefore, dismiss the appeal with costs.

B. M.

Appeal dismissed.

CIVIL RULE.

Before Mr. Justice Pratt and Mr. Justice Pargiter.

DWARKA NATH MITTER

v.

BANKUTESH LAL MITTER AND OTHERS.*

Bengal Tenancy Act (VIII of 1885), Secs. 93, 95—Common manager, appointment of, when complete—Manager resigning, effect of—Judge, power of.

The appointment of a common manager under section 95 of the Bengal Tenancy Act is only complete when the required security has been given and possession has been taken under the order.

Semle :—The powers of a Judge under section 95 are not exhausted by the appointment of a person who has entered upon the duties of his office and has subsequently vacated the same by death, voluntary relinquishment or otherwise. The abdication of the manager has not the effect of restoring the estate to the owners.

Dwarka Nath v. Bankutesh Lal (1) dissented from.

Petition by one of the co-owners.

Application under section 93 of the Bengal Tenancy Act to appoint a common manager.

The facts of the case appear sufficiently from the judgment.

Babu Atulya Charan Bose for the Petitioner.

Babus Ram Chandra Mazumdar and Biraj Mohan Mojumdar for the Opposite Party.

C. A. V.

* Civil Rule No. 2189 of 1905, in the matter of Miscellaneous Judicial Case No. 81 of 1904 of the Court of F. Roe Esq, District Judge of Burdwan.

(1) (1905) 10 C. W. N. 437.

CIVIL.

1906.

Ram Charan Naskar

v.

Hari Charan Guha.

Rampini, J.

CIVIL.

1905.

July, 18 28.

CIVIL.

1905.

Dwarkanath Mitter
v.
Bankutesh Lal
Mitter.

The judgment of the Court was as follows :

Pratt J.—The facts of this case have been fully laid before us and we have also examined the record of the lower Court. An application having been made to the District Judge under section 93 of the Bengal Tenancy Act to appoint a common manager of three groups of properties, the District Judge, after registering three miscellaneous cases, issued notices on the co-owners to appoint a common manager. After the parties failed to do so, the Court proceeded under section 95 to appoint Gobinda Nath Dutt, common manager. That was on the 14th February 1905. Subsequently on the 23rd March, that gentleman wrote to the Judge to say, that he did not wish to take charge of the estates until the close of the Bengali year. The Judge replied that he must enter upon the duties of his office forthwith. On the 3rd April, Gobinda Nath Dutt wrote tendering his resignation on the ground that the manager's presence in the Mofussil was necessary, and that he could not undertake such a duty while he held the post of Treasurer to the Burdwan Raj. The Judge accepted his resignation on the 8th April, and on the same day he gave notice of what had occurred to all the pleaders of the various parties concerned, and on the 10th after hearing the pleaders, he directed that Lokenath Mitra be appointed provisionally as common manager, and he fixed the 10th May for confirmation of the appointment, at the same time intimating that he would hear the objections of any co-sharer on that date. On the 10th May, no objection having been made, the appointment was confirmed.

This Rule was issued on the ground that the appointment was made without notice to and without hearing the petitioner Dwarka Nath Mitra, who is one of the co-sharers. Upon the facts, we are satisfied that the petitioner had due notice through his constituted attorney. This suffices to dispose of the Rule. But it has been urged, that when once an appointment has been made, the Judge has no power to appoint a successor, and our attention has been drawn to another of the three cognate cases in which that view was expressed by Stephen and Mookerjee JJ. (1). But after perusing the correspondence in the case, we are of opinion, that that question does not arise, because the Judge's first nominee never in fact entered upon the duties of his office. The appointment of a Receiver is only complete when the required security has been given and possession has been taken

(1) [See Dwarka Nath v. Bankutesh Lal (1905) 10 C. W. N. 437—Rep].

under the order, and we think that the same rule must apply in the case of a common manager. Here no security seems to have been demanded, but the manager positively declined to take charge of the properties, and he resigned before doing so. Therefore, his appointment fell through and never became effective, so that Lokenath Mitra cannot be properly described as his successor.

If it were necessary in the circumstances of the present case to consider whether the powers of a Judge under section 95 are exhausted by the appointment of a person who has entered upon the duties of his office, and has subsequently vacated the same by death, voluntary relinquishment or otherwise, we should with all respect be unable to adopt the view expressed by the learned Judges in the analogous case. The management has not been restored to the co-owners as contemplated by section 99. No fresh application has been made to the Judge under section 93, nor would it be possible for any co-owner to apply in an ordinary case where the late common manager had registered his name under section 78 of the Land Registration Act, as then the co-owners would not fulfil the requirements of the proviso to section 93. In such a case, there would be a dead lock, and the estate might suffer irreparable injury, if the Judge were powerless to appoint a manager. The owners had been given an opportunity to appoint a common manager, and having failed to do so, the control of the estate has passed to the District Judge, who has not restored it to the owners. In such a state of things, we do not see how the co-owners could be again called upon by the Judge to appoint a manager, nor why he should be debarred from appointing a successor to the former manager. The Judge evidently thinks that the estate should not yet be restored to the owners, and we are unable to hold, that the abdication of the manager would have the effect of so restoring it. The Rule is discharged for the reasons previously indicated. The opposite party is entitled to his costs. The hearing-fee being assessed at five gold mohurs.

A. T. M.

Rule discharged.

CIVIL.
 1905.
 Dwarka Nath Mitter
 v.
 Bankutesh Lal
 Mitter,
 Prati, J.

PRIVY COUNCIL.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

MA WUN DI AND ANOTHER

v.

MA KIN AND OTHERS.

P. C.

1907.

*November, 5, 8,
and
December, 2.*

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Marriage—Presumption of its existence arising from co-habitation with habit and repute—Conditions precedent to its application—Practice—Point not submitted to either Court in India, raised before the Privy Council.

Before applying the general presumption of marriage arising from co-habitation with habit and repute, it is necessary to make sure that there are the conditions necessary for its existence, viz, first, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise, and second, the habit and repute, which alone is effective, is habit and repute of that particular status, which in the country, in question, is lawful marriage.

Their Lordships of the Judicial Committee were unable to entertain a point urged by the appellants having the same been submitted in the conduct of the case to neither Court below.

Appeal from a decree of the Chief Court of Lower Burma (March 19, 1906) confirming a decree of the District Court of Amherst in Moulmein (June 27, 1905) dismissing the appellants' suit with costs. Maung Gale, the disposition of whose property was the subject of the appeal, was by religion a Buddhist, and was a native of and domiciled in Burma. Up to 1887, he resided in Moulmein with his wife, Ma Kin, the first respondent and his five children, the remaining respondents. In that year, he went to Chiangmai (Teinwi) in the Siamese Shan States where he traded with money sent by his brother, Maung Tha Huyin, and with the exception of expeditions into the Teak forests and occasional visits to Moulmein, he lived there, until his death in July 1894. On his death, his estate was taken possession of by H. B. M., Consul in Siam and was shortly afterwards made over to the deceased's brother Tha Huyin, who retained possession of the whole. Subsequently his wife Ma Kin, who had continued to reside in Moulmein, was, in 1898 appointed administratrix of his estate by the Court in Burma, and she shortly afterwards commenced proceedings against Tha Huyin for recovery of the deceased's property—which ultimately became the subject of appeal to His Majesty in Council and the action was compromised by the payment, on July 1, 1902 by Tha Huyin to the first

respondent as such administratrix, of Rs. 53,000. Shortly afterwards, the first appellant Ma Wun Di claimed her share as one of his widows, and the share of her son, the second appellant Maung Myat Pu, in that amount from the first respondent, as administratrix, and on January 27, 1903 commenced the suit, now under appeal, in the district Court of Amherst in Lower Burma against the respondents as defendants. The appellants alleged in their plaint that the first appellant was lawfully married to Maung Gale at Cheingmai in 1887, where she lived and cohabited with him and assisted him in his business until his death, that the second appellant was the only child of Maung Gale and the first appellant, that, according to Burmese Buddhist Law, the appellants were entitled to half share of Maung Gale's estate, and that the first appellant had applied to the first respondent for payment of same, but the first respondent denied that the appellants were heirs of Maung Gale or entitled to any share of his property. The appellants, therefore, prayed that it might be declared that they were respectively a widow and a son of Maung Gale, and that as such, they were entitled to half share of his estate, consequential relief was also asked for.

The first respondent in her written statement put in issue the allegations of the appellants. She alleged that the first appellant was not the wife of Maung Gale, but that her status was only that of one of numerous concubines taken by him from time to time during his stay in Siamese territory, most of whom were discarded by him sometime before his death, and that the first respondent would herself have been discarded by Maung Gale, had he not died before he could carry out his intentions. The first respondent also stated that she had heard that Maung Gale had a child by the first appellant, but that she had never seen the child, and she put the first appellant to proof of the fact that the second appellant was the child in question. She further alleged that neither of the appellants were entitled to receive anything out of Maung Gale's estate, but were only entitled to retain what he gave them during his lifetime, and asserted that for the past fifty years, it had been the practice of Moulmein foresters to take to themselves women of the country when visiting and residing in Siamese territory, but never, as far as she could ascertain, had the children of such women been considered legitimate children entitled to inherit. Of the five issues fixed by the District Judge, it is necessary to mention the following three only. I. Whether the first plaintiff, Ma Wam Di, was the

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legally married wife of Maung Gale? II. Whether the second plaintiff Maung Myat Pu was the legitimate son of the late Maung Gale? III. Whether either, or both plaintiffs are entitled to a share in the estate left by Maung Gale, and if so, to what share, and to what share are the heirs entitled?

The District Judge decided that the first appellant was not the legally married wife of Maung Gale, and that the second appellant was not his legitimate son. He considered as a result of his findings on the first two issues, that it was not necessary to go into the other issues and dismissed the appellants' suit with costs. The following is taken from his judgment:—

"I am not satisfied that any wedding ceremony as alleged took place. Had any ceremony taken place, it would have been done on a grand scale. Maung Gale's servant Maung Myim would undoubtedly, as alleged, have been present, and would have given it as the first proof of Ma Wun Di being Maung Gale's wife, instead of saying, as he did, that he knew she was Maung Gale's wife," because they lived together, ate together, and slept together, and went about together. Holding that there was no wedding ceremony, the next point to consider is the conduct and relationship of Maung Gale and Ma Wun Di.

On this point it is admitted, that Maung Gale kept three other Shan girls in the same house with Ma Wun Di. That each occupied a separate room and Maung Gale divided his attention amongst them, sometimes eating and sleeping with one and sometimes with the others. The witnesses one and all say that Maung Gale acknowledged Ma Wun Di as his wife and that she was regarded as such by the public. With regard to the evidence of the witnesses examined on commission, I am not inclined to put any reliance. Witness Ya-Kam Paw and Sen Tep Pa Sing by their own statements clearly know little or nothing about Maung Gale's family affairs and two of the others are related to Ma Wun Di.

They were subjected to no proper cross-examination and the Court had no opportunity of judging by their demeanour whether or not they were speaking the truth. With reference to the other witnesses, it is quite clear from the evidence of Maung Shwe Law and Maung Bin that Ma Wun Di, not only did not dress like the wife of a wealthy man like Maung Gale, but even had to do menial work and was subordinate to a servant like Maung Bin.

Now it is impossible to believe that had Ma Wun Di been the acknowledged wife of Maung Gale (a man who lived like a

prince) that he would have kept her in the same house on the same level with three other women who were admittedly concubines and made her subordinate to a servant like Maung Bin. Again Maung Gale's letter Ex. 1 proves clearly that he only regarded Ma Wun Di as a temporary mistress or "monkey wife" and that he intended to discard her like the others when he returned to Moulmein. Not only as the events which occurred during the life time of Maung Gale prove that Ma Wun Di was nothing more than a temporary mistress, but the subsequent conduct of Maung Shwe Law and Ma Wun Di on his death corroborate the same and prove conclusively that not only was she not regarded by the public as the legal wife of Maung Gale, but that even she herself did not consider herself as such.

The learned advocate Maung Chit Hleing lays great stress on the documents, Exs. A and B. It is true that in these documents Ma Wun Di is described as the wife of Maung Gale, and at first sight they appear to be strong proof of Maung Gale having acknowledged her publicly as his wife. Ordinarily this would be; but when one comes to consider the circumstances of the present case, and that it is the custom for Burman foresters to take on a temporary mistress "monkey wife" during their stay in Siam, I do not think any importance can be attached to the entries. For the above reasons, I am satisfied that Ma Wun Di was merely a "monkey wife" or temporary mistress of Maung Gale and not his legal wife.

For the above reasons, issues one and two are decided in the negative. On the finding of the first two issues it is unnecessary to go into the other issues?

The Chief Court of Lower Burma on appeal by the appellants confirmed the judgment and decree of the District Judge. The judgment contained the following :

The learned advocate for appellants has referred to the wellknown principle, that the presumption of marriage arising from cohabitation with habit and repute can be rebutted only by the clearest and most satisfactory evidence. It would in my opinion be quite unreasonable to allow this presumption to arise or have any weight in the case of a woman who enters into a union with a man with her eyes open to the fact that the man has already a legally married wife. It is not forbidden to a Burman Buddhist to have two wives at the same time ; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare, and

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that it is considered disrespectful. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and I would add that the presumption is strengthened, if, as in the present case, the cohabitation is behind *the back and without the knowledge* of the first wife.

The appellants place much reliance on two documents. One is a certificate of nationality as a British subject of Maung Gale, in which under the heading "Names of female relations living with Maung Gale" is entered "Ma Wun Di wife." The other is a decree of a Siamese Court for money against Maung Gale, husband, and Ma Wun Di wife. I do not think that these documents offered a very strong inference that the relation of husband and wife actually existed.

On the whole I think that the evidence is quite as consistent, and in fact more consistent with concubinage than with marriage. The conduct of Ma Wun Di, subsequent to the death of Maung Gale, raises the strongest inference that she did not regard herself as having the status of wife. She allowed the whole of Maung Gale's property to be taken possession of first by the British Consul, and then by Maung Gale's relations from Moulmein, without raising a protest. Though Maung Gale died in 1894 and though a law suit was going on, about his estate for many years, she never intervened, and it was not till 1902, eight years after Maung Gale's death, and after she had herself married again, that she took any steps to assert her rights as a married woman or to obtain a share of his estate.

As regards Maung Gale it is very clear from his letter to his wife in Moulmein Ex. I which was written in 1890, three years after he had united with Ma Wun Di, that he did not regard Ma Wun Di as having the status of a wife.

There is much evidence on the record that shows that it is customary for Burman foresters from Moulmein, who have to spend long periods in Saim on business, to take concubines in that country. One witness states that those girls can be got for Rs. 5 or 10 each. Maung Gale was a special sinner in this respect. At the same time he would have 5 or 6 concubines, all under the age of 16. Several of these lived in the same house as Ma Wun Di, and the evidence does not convince me that she differed in any way from them, except that she may have been the head of the harem.

The appellants, therefore, appealed to His Majesty in Council.

Mr. Roskill K. C. and *Mr. J. W. McCarthy* for the Appellants :—In both of the lower Courts, the onus of proof of the marriage was thrown on the appellants. But where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly proved that they were living together in consequence of a valid marriage and not in a state of concubinage : *Sastry Velaidar Aromgary v. Sembecutty Vaigalie* (1). There is undisputed evidence in this case proving that the first appellant and the deceased lived together as man and wife, and, therefore, a valid marriage must be presumed. That presumption shifts on the respondents the onus of clearly proving that there was no valid marriage in this case. But the respondents have not adduced any such evidence to rebut that presumption, and, therefore, the lower Courts were wrong in deciding as they did, that there was no marriage between the first appellant and the deceased. Again the Chief Court expressly held that such a presumption could not arise or have any weight in the present case. But it is submitted that that finding is wrong, because the presumption of marriage from co-habitation with habit and repute does arise in a country where concubinage is not considered immoral : *Sastry Velaidar Aromgary v. Sembecutty Vaigalie* (1). Evidence shows that the position occupied by the first appellant was quite a different one from that of other women in the house in Siam, where she was treated as a wife. She is described as a wife in two official documents. One of them is a certificate of nationality issued from the British Consulate at Chiangmai, under the hand and seal of the Vice-Consul to Maung Gale as a British subject which was renewed in 1891, wherein the first appellant is described as wife and none of the other women are so described. The other document is a copy of the judgment in a suit in the International Court at Cheingmai, carried on appeal to the Court of Appeal at Bangkok, in which the deceased and the first appellant were sued as joint defendants and as husband and wife.

An experienced writer, late of Education Department, Siam, describing Siamese wedding, says :—“No registers are signed and no official record of events is made.”

“The whole ceremony above described is only observed in the case of the first or chief wife, who always remains the legal head of her husband's household. Other wives are merely bought as so much merchandise, all formality being omitted

(1) (1881) L. R. 6 App. Cas. 364 (371).

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except such as attends the payment of the purchase money. Polygamy is extensively practised amongst the higher classes, but it is controlled in the case of the poor by the fact that a man must not have more wives than he can keep.

No disgrace of any kind is attended to the condition of a subordinate wife, but she does not hold a high social position. Very often she inhabits a house separated from that in which the head wife resides. Upon the death of the husband, her children are legally entitled to a share of the property, but they do not share on equal terms with the children of the first wife. Then too, a bought wife can be sold or given away while the head wife can only be divorced. It sometimes happens that a man sells one of his concubines and she takes her children with her, if she has any, so that her sons and daughters possess a father and step-father both living at the same time.

Great respect is shown to the condition of motherhood, a wife of low rank with children being of far more importance in the family than even the chief wife should she be childless."

In the Kingdom of the Yellow Robe, by Ernest Young (Constable, 1898) pp. 95, 98 and 99. Women as well as men, can procure divorce for good cause, widows and divorced wives can remarry.

Of the Red Kareas (Shans) Mr. Colguhoan writes : "Marriages are early amongst them and are not binding unless the female has been given away by her parents. ... Divorce is easily obtainable if there are no children ; but should there be one child the parents are not permitted to separate. Before marriage great license is allowed."

Amongst the Shans by A. R. Colguhoan (1885). "In Siam at the present day" says Mr. Campbell "marriage is entirely a matter of arrangement, although the preferences of the young people are generally considered.—Polygamy is permitted, but the principal wife always remains head of her husband's household, and the subordinate wives occupy an inferior position."

Siam in the Twentieth Century by J. G. D. Campbell (1902). "Divorce is easily obtainable."

Ibid. The Chief Judge was wrong when he said that polygamy amongst the Buddhist is rare and that it is considered respectable. The authorities cited do not support that view.

Reference was also made to *Le Peuple Saimois*, by Leon de Rosny (Paris 1885) pp. 78, 79.

It is submitted that marriage must be presumed in this case.

Even assuming there were no valid marriage as contended, the second appellant is entitled, under Buddhist law, to a share in the inheritance inasmuch as his mother, the first appellant, lived with and ate out of the same dish as the deceased.

[LORD ROBERTSON. That point was submitted to neither Court in India.]

MR. ROSKILL : The Courts in India considered only the first two issues, but the third issue would cover the point.

After some discussion, Lord Robertson announced their Lordships' decision on this last point only, that their Lordships would not entertain the point.

Mr. Cowell, for the respondents, was not called upon.

The judgment of their Lordships was delivered by

Lord Robertson.—The question in this appeal is one of fact ; and it has been decided against the appellants by two Courts. The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute.

It is necessary, before applying this presumption, to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Again, the habit and repute which alone is effective, is habit and repute of that particular status which in the country in question, is lawful marriage.

The differences between English and Oriental customs about the relations of the sexes make such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as matter of fact, a repute of marriage. But, in countries where customs are different, it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connexions not reprobated by opinion, but not constituting marriage.

In the present case the broad facts are these : a domiciled Burman, Maung Gale, has his house and wife at Moulmein in Burma ; his business took him to Siam, and there he lived for years with various other women, and with the principal appellant, Ma Wun Di, who, for shortness, will be called the appellant. The appellant has maintained that, while the other women were concubines, she was a wife, taken as a second wife, the first wife being all the time in Burma. The opposite contention is that, while the

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appellant was older than the other women (who all lived in the same house) and had, for that reason and also for reasons of choice, a stronger hold on the man, yet she has not made out the status of a wife. It is a noticeable feature of the case that the appellant, in her own evidence and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connexion; but her counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours or the public; and at all events, there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence, and her stay in it as of longer duration, than those of the other women. In truth, when all is said, there is little more pointing to marriage than the use of the word "wife" by some of the witnesses; and the most cursory, as well as the most careful, examination of the evidence shows that it is applied to persons whose status is not matrimonial.

Nor has the appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are opposite and weighty:—

"It is not forbidden to a Burman Buddhist to have two wives at the same time; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy, that polygamy is rare and that it is considered disrespectable. On the contrary, I should be inclined to say that if a woman cohabits with a Burman, whom she knows to be the lawful husband of another woman, the presumption is that she is a mistress and not a wife, and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife."

There remains to be noticed one point which the appellants' counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale, in 1887, obtained a certificate of nationality as "a British subject, proposing to "travel in Siam." In 1891 he renewed it; and as part of the docket of renewal, which is signed by the

acting Vice-Consul, are the words: "Names of female relations living with Maung Gale: (1) Ma Wun Di, wife; (2) I Mun, sister-in-law." The argument upon this document is that the appellant could only be entitled to be named in this certificate of nationality if, by marriage, she had acquired her husband's certified nationality. On this, however, it is to be observed, first, that this is not evidence of repute at all; the Vice-Consul is not proved to have had any personal knowledge of these people at all, and the most it comes to is that, on this occasion, Maung Gale said that Ma Wun Di was his wife. But, further, any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law, who on no theory was a naturalised British subject. The truth probably is that the entry is put in merely as an item of information identifying Maung Gale, in addition to those given in the body of the certificate.

The appellants' counsel endeavoured to raise the question whether the second appellant, who is the son of the first appellant by Maung Gale, was not entitled to a share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was, in its terms, susceptible of the wider construction thus suggested for it or not, the parties, by their conduct of the case, have construed it in the narrower sense of assuming the existence of a marriage, and the point urged by Mr. Roskill having been submitted in the conduct of the case to neither Court, their Lordships are unable to entertain this question.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

Messrs. Bramall & White. Appellants' Solicitors :

Messrs. Gregory Day & Co. Respondents' Solicitors :

Appeal dismissed.

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PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

FATIMA BIBI AND OTHERS

v.

SHEIKH AHMED BUKSH AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.]

*Mahomedan Law—Validity of gift—Murz-ul-mout—Right test to be applied—
Practice, where concurrent findings of fact are under consideration.*

Where the question was whether a certain deed of gift made by a deceased Mahomedan donor in favour of his son was invalid by reason of the Mahomedan Law of *murz-ul-mout* relating to gifts made in death-illness, and the Courts in India concurred in finding in favour of the donee and applied the test which was treated as decisive on this point, "was the deed of gift executed by the donee under apprehension of death," their Lordships held that the test, which appeared to be the right question, was essentially one of fact, and upheld the concurrent findings of the lower Courts in favour of the donee.

Where the question is essentially one of fact and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, it would probably be enough to prevent their Lordships from interfering, if it should appear that there was evidence such as might justify either view, without any clear preponderance of probability.

Appeal from a decree of the above mentioned High Court (August 14, 1903) affirming a decree of the Subordinate Judge of Cuttack (August 20, 1900).

The principal question for their Lordships' consideration was whether under the Mahomedan Law, a deed of gift executed on May 21, 1897, by one Moulvi Dadar Buksh in favour of his son, respondent Sheikh Ahmed Baksh was valid. One Dadar Baksh, the father of the respondent Sheikh Ahmed Baksh was a Sub-Deputy Collector at Khurdah in Bengal. For some years before his death, he suffered from diabetes. Towards the end of 1896, he was advised that he should go on leave as he was suffering from a serious disease. On April 4, 1897, the Civil Surgeon of Puri certified that he had examined Dadar Baksh on the morning of that day and found him much worse than when he examined him on December 10, 1896. He was of opinion that he was totally unfit for work on account of albumenuria, and should be granted six months' leave for rest and change of climate. Dadar Baksh was granted leave by the Collector of the District in anticipation of sanction and went to his home at Cuttack. He was then examined by a Medical Board, consisting of the Civil Surgeon of Cuttack and the Medical Officer of the Regiment stationed there

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at the time. They certified on May 9, 1897, that he was suffering from albumenuria and considered the state of his health to be such as to render it highly inconvenient for him to proceed to Calcutta for the purpose of examination by the Medical Board there, as directed by Government. On May, 21, 1897 Dadar Buksh and his wife Mussammat Salimatunnissa, the *pro forma* defendant No. 7, executed a joint deed of gift, (*hibanama*) in favour of their son, Ahmed Baksh, the respondent, who was then a minor. His mother conveyed to him certain properties she had acquired by purchase on July 10, 1879, and his father conveyed to him a portion of his immovable estate. It set out that as the grantee had not attained majority, the offer and acceptance duly took place between the grantors and the grantee's maternal uncle, Munshi Mahomed Ibrahim. The deed of gift was registered on May 25, 1897.

Dadar Baksh died on May 27, 1897, leaving him surviving a widow, the said Mussammat Salimatunnissa, a son, the said Ahmed Baksh and six daughters, *viz* :— (1) Fatima Bibi, married to Syed Nurul Huq; (2) Khadeja Bibi married to Syed Abu Ahmed; (3) Zohra Bibi, (4) Zainab Bibi, (5) Zobeda Bibi and (6) Khatema Bibi married to Syed Abu Mohammad.

On March 26, 1898, the then married daughters presented to the Deputy Collector, petitions for registration of their names, in respect of 7 pice interest each in the estates named in the petitions, which they claimed as heirs of their fathers. The widow of Dadar Baksh put in an objection on behalf of her minor son, Ahmed Baksh, in which she stated that Dadar Baksh had executed a deed of gift on May 21, 1897, by which he gave all the said properties to his son. The Deputy Collector, holding that the matter involved intricate questions of Mahomedan Law, referred the cases to the District Judge of Cuttack for determination under section 55 of Act VII of 1876 (B. C.).

On July 2, 1898, the District Judge delivered his judgment on the matters referred to him. He decided that the deed of gift was made during the death illness (*Murs-ul-mout*) of the donor and was consequently invalid. His answer to the reference, therefore, was that the petitioners, the then married daughters of Dadar Baksh, were entitled to be registered to the extent of 7 pice each. On appeal against that order the High Court of Judicature at Fort William in Bengal made on January 31, 1899, an order refusing to interfere under section 622 of Act XIV of 1882.

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On December 27, 1898, Khatema Bibi, one of the married daughters, executed a deed of release in favour of the said Ahmed Baksh, in which she admitted that the deed of gift executed by her father was valid.

On July 15, 1898, Syed Nurul Huq, the husband of Fatima Bibi, applied to the District Judge of Cuttack to be appointed guardian, under Act VIII of 1890, of the three minor and unmarried daughters of Dadar Baksh for the purpose of protecting their interest in the property left by their father on the ground that their mother was not a fit person to be their guardian, as she had an interest adverse to that of the minors, and done acts prejudicial to their interest. On March 18, 1899 an order was made appointing the applicant as such guardian.

On July 1, 1899, Ahmed Baksh, having regard to the above mentioned orders of Court and the claims made by five of his sisters, instituted the present suit in the Court of the Subordinate Judge of Cuttack. The five sisters, who contested his claim, were made the principal defendants, and his mother and sister, who admitted it, were made *pro forma* defendants. The plaintiff asserted the validity of the said deed of gift and its recognition by Khatema Bibi. It treated the order of July 2, 1898, for registration of the names of the then married daughters of Dadar Baksh as tantamount to dispossession of the plaintiff to the extent of the shares claimed by them, and prayed for a restoration to possession of the gifted property to that extent (3 annas 6 pies) and a declaration of title and confirmation of possession in regard to the remaining interest in the said property.

In answer to suit the widow confessed judgment and Khatema Bibi did not appear. The other five daughters of Dadar Baksh, who contested the same, filed a written statement in defence, wherein they denied the execution of the said deed of gift in fact, and alleged that, if executed in fact, it was not intelligently executed by Dadar Baksh. They asserted that if duly executed, the deed was invalid under Mahomedan Law, because executed during death-illness, because improperly registered, because insufficiently stamped and because the gift was not completed by delivery of possession.

Of the six issues fixed by the Subordinate Judge, only one is material for the purpose of this report:—"Is the *hebanama* propounded by the plaintiff a genuine and valid document?"

The Subordinate Judge delivered his judgment on August 20, 1900, and decided that the deed was duly stamped and duly

registered. In regard to the alleged invalidity on the ground that possession of the gifted property was not given to the donee, he found as a fact that possession was delivered and as a question of law, that delivery of possession was not necessary under the Mahomedan Law when the donor and donee were father and minor son. On the general question of the validity of gift made in death illness (*murs-ul-mout*) he held that by Mahomedan Law to invalidate a gift, the donor must at the time of the gift be under apprehension of death, and that as a fact, Dadar Bāksh was not, on May 21, 1897, under such apprehension. In accordance with the above findings, he made a decree granting the plaintiff the relief prayed for with costs, except in regard to one house as to which he held that the plaintiff ought to have sued for possession, not for a declaration of title. His judgment on the issue set out above was as follows :—

"I think it will be better to examine first the law on the subject of death-bed gifts (*murs-ul-mout*) and then apply the law to the facts of this case.

"From the cases reported in W. R., page 17 ; 3, W. R. page 40 ; 9, W. R., page 142, I. L. R. 9 All. page 359 ; 3, Weekly notes, Calcutta. page 59, and from text books of Justice Ameer Ali and Shama Charan Sarkar, it appears that gifts made by Mahomedans, while under apprehension of death, are invalid. In 3 C. Weekly Notes. page 59, Justice Ameer Ali said in determining whether the donation of a person suffering from a mortal disease comes within the doctrine of (*Murs-ul-mout*) gifts, several questions have to be considered, *vis.*—

"Was the donor suffering at the time of the gift from a disease which was the immediate cause of death ?

"2. Was the disease of such a nature as to induce in the person suffering, the belief that death would be caused thereby, or engender in him the apprehension of death ?

3. Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate death or to accustom the sufferer to the malady ?

"This being the law on the subject, let us determine what the state of Dadar Buksh's health was at the time he executed this deed.

"From the testimony of Salitmatunnissa Bibi (his wife), Babu Balaram Bose (the Sub-Deputy Collector) and Dr. Bhusun Chandra, it appears, that Dadar suffered from diabetes at least 6 or 7 years before his death. Albumenuria then ensued.

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Babu Balaram told us that 11 months before Dadar left Khurdah for good, he told him he had got albumenuria. When he first got the disease, or when it was first noticed, there is no evidence, but it must be before the above 11 months. After leaving Khurdah, he lived at Cuttack for about 3 weeks and then he executed this document. Thus it is clear that Dadar had suffered from this disease at least for 12 months before he executed this deed. From Babu Balaram's evidence, it appears that Dadar Buksh had while at Khurdah almost all the symptoms which were subsequently stated in Medical Board's statement of his case, Ex. VIII. He also used to get fever now and then.

"Thus he was suffering (1) from diabetes for 5 or 6 years; (2) from albumenuria for at least 12 months and occasional fevers. With all these maladies on him, he worked and then came home on sick leave about 4 weeks before his death. Thus the disease, he had been suffering from, was of long continuance and hence accustomed him to it as also lessened the apprehension of death.

"Then let us see what the actual state of the patient's mind was at the time he executed this document. For the purpose of ascertaining this it will be necessary to consider what the opinion of his attending physician was, (2) what he himself, his relatives, and friends thought of the illness.

"His attending physicians were Dr. Meadows and Keshab Chandra. Dr. Meadows is no more and Keshab Chandra was not examined. So we have not the opinions of any of the attending physicians. It was defendants' duty to examine Dr. Keshab Chandra, because they wanted to have the deed set aside on the ground of its being *Murs-ul-mout* gift. The plaintiff on the other hand examined Dr. Zorab, the Civil Surgeon of Cuttack and Babu Bhushan Chandra. Dr. Zorab says.—"A man suffering from albumenuria may live for years." The same opinion was expressed in a Medical treatise which was quoted and recorded in his deposition. In that treatise it is said that albumen is found in the urine of healthy persons.

"Thus the medical evidence is that albumenuria is not a fatal disease, that a man with that disease may live for years.

"Dadar Buksh had diabetes for years.

"Dr. Zorab deposed that a patient with the symptoms described in Ex. VIII (Medical Board's statement of Dadar's case) was not in danger of imminent death. The doctors who granted him the Medical Certificates, (Exs. G. and XX), also did not

entertain the opinion that death was imminent, because they thought that change and rest would cure him.

"Thus men like Dr. Meadows and Princhart thought on the 9th of May that Dadar Buksh was not in danger of imminent death, and Dr. Zorab on hearing the statement of the case was of the same opinion. On the 20th and 21st, the patient was under the treatment of Dr. Meadows. He made some prescriptions for him on those days. (Exs. IXa to IXd.) and Dr. Zorab on hearing those prescriptions read out, said "from the above prescriptions, I think the doctor who was treating the patient could not have thought he was to die within a short time. There is nothing in the prescriptions to indicate he was in a critical state.

"Thus the evidence is that the doctors did not on the 9th of May think that the patient was in danger of death, that the doctor who treated him on the 20th and 21st did not think him to be in danger of imminent death, and the deed was executed on the 21st.

"Then let us consider what Dadar himself and his relatives thought of his illness. Dadar, a little after his arrival at Cuttack, drove to a dispensary and walked to the dispensary room. He also drove to Dr. Bhushan's place and walked with the latter up to a certain distance. Thus the condition of his health was not such as to inspire him with apprehension of death. His wife deposed that neither he nor his relatives had apprehended death. She is the best person to depose on this point, being naturally his constant companion, especially during illness. Several respectable persons, who had visited Dadar during his illness were examined by defendants, and not a single person was questioned about Dadar's apprehension of death. It was Nurul Huq only who deposed on this point, but I cannot place reliance on his uncorroborated testimony, especially when it is opposed to medical evidence.

"The Court, therefore, finds that at or about the time this deed was executed, neither Dadar nor his friends and relatives were under apprehension of death.

"I have found before that the doctors who gave him the certificate and treated him were not of that opinion. On the contrary they thought that recovery was probable.

"There is another little circumstance which proves that Dadar Buksh was not under apprehension of death at that time. The *hebanama* makes mention of his future heirs.

"Now, the idea of death can never enter the head of any man who thinks of begetting children.

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"Thus, from whatever side we look at the question, we cannot but conclude that Dadar did not apprehend death at this time. The Court finds accordingly :

"The Mahomedan Law lays down that to make a gift invalid, the donor must be under apprehension of death. In this case Dadar was not under apprehension of death and, therefore, the deed was not invalid.

"True, Dadar Buksh died within 7 days after the execution of the deed, but the Mahomedan Law does not say that if a deed of gift is executed during illness and that illness ends fatally, the gift will be invalid. But it says, to invalidate a document executed during illness, the donor must apprehend death.

"In this case Dadar whilst executing the deed was not only in full possession of his senses, *vide* I. L. R. 3 Allahabad, 734, but the gift was a foregone conclusion as proved by Babus Balaram and Bhushan Chandra.

"The finding is that the deed is not invalid on the ground that it was executed during his illness, an illness which ended fatally."

Cross appeals by the appellants and the respondent Sheikh Ahmed Buksh to the High Court of Judicature at Fort William in Bengal were disposed of by one judgment (1). Except as to the question of fact, *vis.*, whether possession was actually delivered on the execution of the deed in question, in regard to which no opinion was expressed, the High Court affirmed the judgment of the Subordinate Judge on all questions of law and fact and dismissed the appeals with costs.

The appellants, thereupon, preferred the present appeal to His Majesty in Council.

Mr. Jardine, K. C. and Mr. Ross, for the Appellants :— There is evidence to show that Dadar was very ill. That fact raises a presumption that the gift in this case was invalid under the law of *Mars-ul-mout* and shifts the onus on the other side, which must prove that the gift was good, because the law of *Mars-ul-mout* did not apply to this present case. It is submitted that the respondent has not discharged that onus and thus the gift is bad. The High Court is not right in saying that the question is whether Dadar was under apprehension of death. That is not a correct test. One must look to the surrounding circumstances to find whether there was apprehension of death, and not only to the state of mind of the patient as the lower Courts have done. Here all the surrounding circumstances go

(1) (1903) I. L. R. 31 Cal. 319.

to show that there was apprehension of death and the gift is therefore, bad. Baillie in his Digest of Mahomedan Law (2nd edition,) Book VIII, Ch. VIII at page 552, says that the most valid definition of death-illness is, that it is one which it is highly probable will issue fatally, whether, in the case of a man, it disables him from getting up for necessary avocations, out of his house or not, such as for instance, when he is a *vakeel* or lawyer from going to the *musjid* or place of worship; and when he is a merchant, from going to his shop and whether in the case of a woman it does or does not disable her from necessary avocations within doors. Ameer Ali in his Mahomedan Law (3rd edition,) Vol. I at page 22, gives the same passage, but curiously enough has fallen into an error by putting it in inverted commas as the translation of the *fatawa*. The correct translation of the *fatawa* is given in the *Calcutta Law Journal* (1905), Vol. I, No. 12, para 16. Reference was made to the following: "Appendix C referred to in paragraph 16 of the Review being a correct translation of what is at page 453 of Baillie's Digest, 1st edition, to supply the place of the passage in Baillie beginning with words: "The most valid definition of death-illness is that and &c." These words are so reproduced here within inverted commas on words of Mr. Baillie himself introducing the subject and have no place in the Doorool Mukhtar, p. 246 to which reference is made in the foot-note by Mr. Baillie (*Calcutta Law Journal*, (1905), Vol. I, No. 12, p. 131n). The evidence shows that the illness here was one which it was highly probable would issue fatally, and consequently the gift is bad.

There is not concurrence in the judgments of the lower Courts and, therefore, the finding is not concurrent in the true sense.

Mr. DeGruyther for the Respondents:—The question with reference to the invalidity of a gift under the law of *Marz-ul-mout* has been recently considered by the Judicial Committee in the case of *Ibrahim Goolam Ariff v. Saiboo* (1), and the principles there laid down should be applied to the present case. In order to establish *Marz-ul-mout*, there must be present at least three conditions: 1st, proximate danger of death, so that there is, as it is phrased, a preponderance of *khauf* or apprehension, that is, that at given time, death must be more probable than life; 2ndly, there must be some degree of subjective apprehension of death in the mind of the sick person; 3rdly, there must be some external

(1) (1907) 9 Bom. L. R. 872; 9 C. W. N. 978.

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indications, chief among which would be the inability to attend to ordinary avocations : (See, *Sarabei v. Rabiabai* (1) followed in *Rashill Karmalli and another v. Sherbanoo* (2).

The Courts in India after examining the whole of the evidence, have concurrently found on all the three points in favour of the respondent.

The evidence actually goes to show that death in this case took place suddenly. The gift is good as found by the Courts in India.

Mr. Jardine replied that *Sarabei v. Rabiabai* (1) followed the decision of the Calcutta High Court in this very case under appeal.

The judgment of their Lordships was delivered by

December, 2.

Lord Collins.—The question in this case is whether a certain deed of gift made by one Moulvie Dadar Buksh deceased in favour of his son Sheikh Ahmed Buksh is invalid by reason of the Mahomedan Law of *Mars-ul-mout* relating to gifts made in death illness. The deed was executed on the 21st May 1897, and on the 27th of the same month, Moulvi Dadar Buksh, the donor, died. A great number of objections to the deed were urged by the appellants (the defendants) before the Subordinate Judge, all of which were considered in great detail and over-ruled by him in a most elaborate judgment in favour of the respondents. That judgment was affirmed on appeal by the High Court at Fort William, and it is the concurrent judgments of these two tribunals, that this Board is now called upon to over-rule. The only point which the appellants have argued on this occasion was that which no doubt goes to the root of the matter, *viz.*, whether the gift was invalid under the law of *Mars-ul-mout*. The test which was treated as decisive of this point in both Courts was : Was the deed of gift executed by Dadar Buksh under apprehension of death ? This, which appears to their Lordships to be the right question, is essentially one of fact, and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, and it would probably be enough to prevent this Board from interfering if it should appear that there was evidence such as might justify either view without any clear preponderance of probability. Their Lordships are, however, clearly of opinion that the reasons given both by the

(1) (1905) I. L. R. 30 Bom. 537 (551). (2) (1907) I. L. R. 31 Bom. 264.

Subordinate Judge and by the High Court, which they will not repeat, establish a large preponderance of probability in favour of the conclusion at which they both arrived.

Their Lordships will therefore, humbly advise His Majesty that this appeal be dismissed.

The appellants will pay the costs of the first respondent who alone defended the appeal.

Mr. G. C. Farr, Solicitor for the Appellants.

Mr. W. W. Box, Solicitor for the Respondents.

J. M. P.

Appeal dismissed.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson*,
MUSAMMAT SURAJMANI AND OTHERS

v.

RABI NATH OJHA AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE FOR THE
NORTH-WESTERN PROVINCES, ALLAHABAD.]

Hindu Law—Testamentary gift of immovable property to a Hindu widow—

"Malik," effect of the word—Interpretation in such a case principle of.

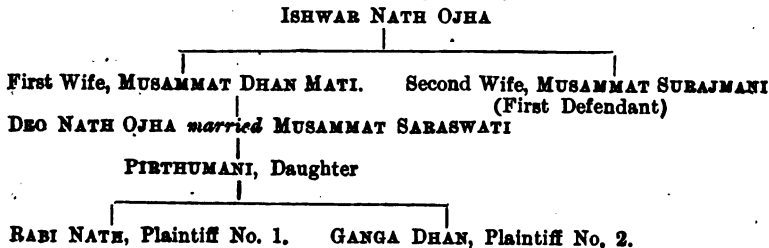
Where the question was whether a Hindu widow acquired a right to alienate the property (immovable) in suit under a deed of gift or testamentary disposition of her late husband, wherein the word used was '*malik wa khud ikhtiyar*,' their Lordships held that in order to cut down the full proprietary rights that the word (*malik*) imports, something must be found in the context to qualify it and that the fact that the donee was a woman and a widow did not suffice to displace the presumption of absolute ownership implied in the word *malik*.

The donee in the case of *Lalit Mohun Singh Roy v. Chukkun Lal Roy* (1) was a man, but the principles of interpretation laid down in that case were of general application.

Appeal from a decree of the above mentioned High Court (November 2, 1903) affirming a decree of the Court of the Subordinate Judge of Gorakhpur (March 11, 1901).

The principal question raised on the present appeal was whether the first appellant, Musammat Surajmani had or had not the power of alienation in regard to the property in suit.

The following pedigree will help to explain the case:



(1) (1897) L. R. 24 I. A. 76.

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The property in suit belonged to Ishwar Nath Ojha, who on April 2, 1877 executed a document purporting to be a deed of gift of certain immovable property in favour of his two wives, Musammat Dhan Mati and Surajmani and of his daughter-in-law, Musammat Sarswati, to take effect after his death. The material part of this document is set out in their Lordships' judgment.

Ishwar Nath Ojha died in or about the year 1882, leaving him surviving all the persons whose names appear in the above pedigree except his son Deo Nath Ojha. Musammat Surajmani thereafter took possession of the property devised to her, and on March 19, 1896, she executed a will by which she devised it to her brother, Ram Narain Ojha, who died prior to the institution of the present suit on September 4, 1900 by the respondents, Rabi Nath and Gangadhar against Musammat Surajmani and the sons and heirs of Ram Narain Ojha as defendants. The respondents in their plaint after explaining their right to sue as heirs both of Ishwar Nath Ojha and his widow Musammat Surajmani (to whom, it was alleged, possession of the property in suit was given for life only), prayed that it might be declared that the appellant Musammat Surajmani was incompetent to transfer the property in suit and that the will, dated March 19, 1896 was invalid as against them.

Written statements, in reply to the plaint, were filed on behalf of the appellants and (*inter alia*) it was pleaded therein that the respondents were not the heirs of Ishwar Nath Ojha, nor of his widow Musammat Surajmani, and that the will of Ishwar Nath Ojha conferred upon Musammat Surajmani a heritable and alienable estate, which she was competent to transfer by her will.

The Subordinate Judge fixed the following issues :

1. Are the plaintiffs heirs of Ishwar Nath and of Surajmani ?
2. Whether the will of Ishwar Nath conferred on Surajmani only a limited widow's estate for life or a heritable and an alienable estate ?
3. Can the plaintiffs sue during the life of their mother and grand-mother ?

On March 11, 1901, the Subordinate Judge delivered his judgment deciding the three issues in favour of the respondents and made a decree granting them the declaration prayed for. With reference to the second issue, he held that as the will of Ishwar Nath Ojha conferred on his widow, Musammat Surajmani, only a limited widow's estate for life and not an alienable estate, she was not competent to transfer the property in suit, and that

the will, dated March 19, 1896, executed by her, was invalid as against the respondents.

Against that decree the appellants appealed to the High Court of Judicature for the North-Western Provinces, Allahabad, and on March 3, 1903, the High Court delivered its judgment and decided that in the case of a gift of immovable property by a husband to his wife, the wife had no power of alienation unless conferred upon her in express terms. In the result, a decree was made dismissing the appeal with costs.

The appellants, thereupon, preferred the present appeal to His Majesty in Council.

Mr. DeGruyther for the Appellants :—The most important words in the deed of gift executed by Ishwar Nath Ojha are “that during my lifetime, I shall remain in possession of the said property as heretofore—that after my death they (donees) shall—remain in possession as owners with proprietary powers.” The lower Courts have held that the devisee took in this case only a life estate. Mr. Mayne in his *Hindu Law and Usage*, (7th Ed.), p. 890, section 664 says “Immovable property, when given or devised by a husband to his wife, is never at her disposal, even after his death. It is her *stridhan* so far that it passes to her heirs, not to his heirs.” The learned Judges who decided the case of *Jeewun Punda v. Mussumat Sona and others* (1) laid down the law that “if a Hindu make a gift of land to his wife, without any express power of alienation, it may be contended that he does so knowing that, under the law, she takes no interest which she could alienate; if, on the other hand, he makes such a gift, accompanied with an express power, it may be contended with even greater reason that, knowing the disability which by law would attach to a simple gift, he desired to clothe her with larger powers than those to which she would by the operation of the law be entitled.” That decision is not right and does not apply to this case. The lower Courts were wrong in following it. The law as stated by Mr. Mayne is right. The word used in making the gift is *malik*, which means proprietor and gives power of alienation. The Courts in India were wrong in holding that the deed here did not give the donees full rights of proprietorship including power of alienation. The donor was the proprietor with power of alienation and he made a condition in the deed that he was to remain as such owner during his lifetime as heretofore and after his death he

(1) (1899) 1 N. W. P. H. O. R., 66, (67).

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gave the donees exactly what he stipulated to retain for himself, that is, proprietorship or ownership with power to alienate. It has been held that the effect of the word *malik* in a testamentary gift is to confer upon the donee an heritable and alienable estate in the absence of a context which indicates a different meaning: *Lalit Mohun Singh Roy v. Chakkun Lal Roy* (1). There is nothing in the context here to indicate that the donees are to take any estate other than that conferred upon them by the use of the word *malik*. The donees in this case took an heritable and alienable estate. In a recent case where a Hindu governed by the Mitakshara Law devised immovable property to his wife stating that she would be the *malik* of the property after his death, this very High Court, whose judgment is under appeal held that the word *malik* imported an absolute proprietary interest, and that in the absence of any indication of a contrary intention on the part of the testator, the widow took an absolute, and not merely a life estate in the property devised: *Padam Lal v. Tek Singh* (2). In this case the question is the same and it is submitted that the decision under appeal is wrong and that the decision in *Padam Lal v. Tek Singh* (2) is right.

Mr. Ross for the Respondents:—The document in this case contains no words such as heirs, issues, sons or grandsons to show that an estate of inheritance was devised. Where an owner of immovable property devised that "the wife of my son shall be regarded as owner after my death," it was held that the devise must be taken to convey an estate for life only and not the absolute ownership: *Mathura Das v. Bhikhan Mal* (3). Again where a Hindu devised that "after my death, my wife is to be the person in possession and ownership in place of me, it was held that the intention of the testator was to leave the property to his widow as her *stridhan*, to descend to her heirs: *Fanki v. Bhairon* (4). Similarly the widow, the donee in this case, took only a limited estate, because the word *malik* means owner and not absolute owner as is contended, and *khud ikhtyar* means independent with exclusive rights. The lower Courts were right in holding that the widow here took only a life estate. In case of immovables bestowed on her by her husband, a woman

(1) (1897) L. R. 24 I. A. 76 ; I. L. R. 24 Calc. 834.

(2) (1906) I. L. R. 29 All. 217.

(3) (1896) I. L. R. 19 All. 17.

(4) (1896) I. L. R. 19 All. 133.

has no power of alienation by gift or the like: Stokes' Hindu Law Books, the *Dāya-Bhāga*, Ch. 4, Sec. 1, placitum 23, p. 241. What has been given by an affectionate husband to his wife, she may consume as she pleases, when he is dead, may give it away, excepting immovable property: Stokes' Hindu Law Books, the *Mitakshara*, Ch. 1, Sec. 1, placitum 20, p. 373. Where a Hindu by his will directed that after his death, his wife was to take possession of and enjoy his property, and in another passage declared that "just as he was the owner, so she was to be the owner," it was held that the wife took only a life-interest in the property and that the Courts have always leaned against such a construction of the will of a Hindu testator as would give to the widow unqualified control over his property: *Harilal v. Bai Rewa* (1). Reference was made to Mayne on Hindu Law and Usage, (7th Ed.) p. 527, section 397 and to *Moulvie Mahomed Shumsool Hooda and others v. Shewakram* (2), *Rajnarain Bhaduri v. Ashutosh Chukerbutty* (3) and *Rajnarain Bhaduri v. Katyayani Dabee* (4).

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Mr. DeGruyther, in reply referred to Mayne on Hindu Law and Usage, (6th Ed.) p. 509, and to *Moulvie Mahomed Shumsool Hooda and others v. Shewakram* (2) and contended that the construction put upon the word '*malik*' by Mitter J. in *Musammāt Kollany Koer v. Luchmee Pershad* (5) was the right construction. He asked their Lordships to decide that the decision in *Padam Lal v. Tek Singh and another* (6) was right.

The judgment of their Lordships was delivered by

Lord Collins.—This is an appeal from the High Court at Allahabad affirming the decision of the Subordinate Judge of Gorakhpur. The question is whether the first appellant, Musammāt Surajmānī, acquired a right to alienate the property now in suit under a deed of gift or testamentary instrument of her late husband Ishwar Nath Ojha. The material part of the document is as follows:

"I now of my own free will and accord, while in a sound state of mind and in enjoyment of my senses, make a gift of the entire village Dwarkapur Nankar in tappa Asnari and half of the village Telpurwa in tappa Pachhar to Musammāt Dhanmati, my first wife, the entire village Doharia Khurd in tappa Banjarha and half of mouza Telpurwa aforesaid to Musammāt Surajmānī,

(1) (1895) I. L. R. 21 Bom. 376.

(2) (1874) L. R. 2 I. A. 7, (14 & 15.)

(3) (1899) I. L. R. 27 Calc. 44.

(4) (1900) I. L. R. 27 Calc. 649.

(5) (1875) 24 W. R. 395.

(6) (1906) I. L. R. 39 All. 217.

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my second wife; and half of mouza Jamla Jot, *i. e.*, an eight anna share in it, in tappa Barikpar to Musammat Saraswati, my daughter-in-law, out of the aforesaid property without consideration on the conditions that during my life-time I shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the Musammats aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers; and that if perchance I have a male issue hereafter, this deed of gift shall be considered null and void as against him."

The words translated "as owners with proprietary powers" are in the original "*malik wa khud ikhtiyar*." The appellants contend that these words are amply sufficient to confer an alienable estate. The respondents on the other hand contended, and the Courts below have held, that under these words, the lady took no more than the ordinary estate of a Hindu widow, which is inalienable except in special conditions which are not alleged to exist in this case.

After the death of her husband, Musammat Surajmani entered into possession of the property given to her and has purported to dispose of it by will in favour of her brother Ram Narain Ojha. The present suit is brought by the plaintiffs (respondents) as heirs of Ishwar Nath and of Surajmani for a declaration that the latter was incompetent to execute the said will, and it is against the decision in their favour that this appeal is brought. The effect of the word "*malik*" in testamentary gifts has been often discussed in cases decided in the different Courts in India where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, differently constituted, has refused to follow it and expressed the opinion that the words in question passed the absolute estate: *Padam Lal v. Tek Singh* (1).

In the present case the Subordinate Judge seemed to recognize that the trend of the decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

In *Kollany Kooer v. Luchmee Pershad* (2), decided in 1875, Mitter J., in dealing with the case of a will where the donees (1) (1906) I. L. R. 29 All. 217 (221-2). (2) (1875) 24 W. R. 395.

were the widow and daughter of the testator, and the word "*malik*" was used, thus expresses himself (at p. 396) :

"As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says that after his death they shall be (*maliks*) proprietors and his entire estate shall devolve upon them. In *Jotendro Mohun Tagore v. Ganendro Mohun Tagore* (1) the Judicial Committee say (at p. 365) : 'If an estate were given to a man simply without express words of inheritance, it would, in the absence of a conflicting context, carry by Hindoo Law (as under the present state of the law it does by will in England) an estate of inheritance'. In the testamentary instrument under our consideration, from the context it does not appear that the testator intended a limited gift in favour of Bani Kooer and Uma Kooer. Therefore, adopting the rule of construction above quoted, we must hold that the gift in question was an absolute gift unless it can be shewn that by the Hindoo Law, gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widows' estate' under the law of inheritance. I am not aware of any such provision in the Hindu Law nor have we been referred to any authority in support of it."

The question as to the effect of the word '*malik*' came before this Board in 1897 in the case of *Lalit Mohun Singh Roy v. Chukkan Lal Roy* (2). The donee in that case was a man but the principles of interpretation laid down were of general application. Referring to the donee the testator said :

"If no children are born to me.....or if at the time of my death they are not alive, then.....my nephew..... becoming on my death my *sthalabhishikta* and becoming owner (*malik*) of all my estate and properties, &c., shall, remaining my *sthalabhishikta*, obtaining the management of the *Iswarshebas*.....enjoy with son, grandson, and so on in succession the proceeds of my estate..... The minor, on reaching majority, shall exercise ownership (*malikatwa*) over all the properties."

In delivering the judgment, Lord Davey at p. 88 says :

"It was not disputed that the son of the testator if there had been one, or his daughter, if there had been one, would have taken an absolute heritable and alienable estate..... Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner (*malik*) of all my estates and properties'

(1) (1872) 13 W. R. 359 (365).

(2) (1897) L. R. 24 I. A. 76.

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would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson, and so on in succession' which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word '*malik*' as was taken in the Calcutta case in the 24 W. R. above cited, with the result that in order to cut down the full proprietary rights that the word imports, something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word *malik*, the context does seem to strengthen the presumption that the intention was that '*malik*' should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned counsel for the respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full proprietary right, and, if this be admitted, the respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect for the learned Judges in the Courts below, their Lordships are unable to agree with their decision. Their Lordships will humbly advise His Majesty that the appeal be allowed and the decrees of both Courts below discharged, and instead thereof the suit dismissed with costs in both Courts. The respondents will pay to the appellants the costs of this appeal.

Messrs. Pyke, Parrott & Co.—Appellant's Solicitors.

Messrs. Osborn Jenkyn & Son—Respondent's Solicitors.

J. M. P.

Appeal allowed.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

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RAJA PRAMADA NATH ROY

v.

RAJA RAMANI KANTA ROY AND OTHERS.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.]

Bengal Tenancy Act (VIII of 1885)—Arrear of putni rent due to a co-sharer zemindar—Suit by him under Act VIII of 1885 to recover the whole rent of the tenure—Refusal of his co-sharer zemindars to join as plaintiffs to bring the same—Law applicable to the case—Agreement to pay shares in the putni rent separately—Its effect on the right to sue and on the tenure.

Appellant, a co-sharer in a zemindari interest, in consequence of the putni rent falling into arrear so far as the share which should have come to him was concerned, brought a suit making the putnidars defendants and joining as co-defendants his co-sharers in the zemindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for that purpose to bring to sale the tenure itself. The plaint also asked in the alternative for a decree for the appellant's share of the rent :

Held, that the appellant was competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due in respect of the property in suit.

Held, also, that the law applicable to the present case must apparently be that by the express terms of the Bengal Tenancy Act in the event of the rent being unpaid, the owners of the zemindari interest were entitled, by suit under that Act, to bring a putni to sale, with consequences prescribed by that Act, and it was a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as plaintiffs, could bring them into the suit as defendants, and sue for the whole rent of the tenure, unless there was something to exclude the case from the operation of those rules.

It was contended that the case was excluded from the operation of those general rules on the ground that by express or implied agreement between the zemindars and the putnidars, the shares in the putni rent of the several zemindars were to be paid, and so far as they were paid at all, were in fact, paid separately :

Held, that the right to bring the tenure to sale for arrears of rent remained in tact, and also the right of one sharer to sue, making his co-sharers defendants when they would not join as plaintiffs.

Their Lordships had no inclination to question the course of rulings in Bengal that agreement, either expressly proved or implied by the conduct of the parties, might establish the right to sue separately for the shares of rent receivable by the separate share-holders.

Their Lordships thought that it was clearly a sound view of the law, as clearly laid down in Bengal, that such an arrangement, expressed or implied, merely affected the right to sue separately for rent, and in no other respect modified the terms of the holding.

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Appeal from a decree of the above mentioned High Court (June 3, 1904) affirming a decree of the Court of the Subordinate Judge of Rajshahye (December 17, 1900).

The principal question involved in the appeal was whether the appellant, as one of the co-sharers in the zemindari interest in an estate known as Dihi Haloti, was entitled to sue for the whole rent due from the putnidars of that estate, making his co-sharers in the zemindari interest parties to the suit as defendants.

In the year 1837, one Raja Ram Chandra Bahadur was the sole owner of a separate 8 anna-share in the above mentioned estate. On April 23, 1837, he made a putni settlement of his 8 anna-share with one C. I. Abbott on a yearly rental of Rs. 6,349-6-10.

That 8 anna-share of the zemindari interest was subsequently split up. In April 1895 the plaintiff (appellant) purchased a 2 anna-share, which had passed into the ownership of Brojo Nath Roy and Krishna Lal Roy, and in June of the same year, he purchased a 4 anna-share, from Rani Mina Kumari. Of the remaining 2 anna-share, 1 anna-share was purchased by Jadab Chandra Bagchi, the father of the defendants 18 and 19 (respondents 14 and 15), and the other 1 anna-share, which had become the property of Uma Sankar Sen and Rajani Kant Sen, had passed to the ownership of the defendants 20, 21 and 22 (respondents 2, 3 and 16), Bhuban Mohan Moitra, Sarada Mohan Moitra and Kali Mohan Moitra. Thus at the time of the institution of the suit, the zemindari interest was held as follows :

The appellant	...	...	6 annas.
Respondents Nos. 14 and 15	...	...	1 anna.
Respondents Nos. 2, 3 and 16	...	...	1 anna.

The putni interest of Mr. Abbott passed into the hands of one Nur Mahomed Khan Choudhuri, and at the time of the present suit, was in the ownership of the various defendants numbered 1 to 16 inclusive. The defendant No. 17 (respondent No. 1.), Raja Ramani Kanta Roy, had purchased on April 15, 1898 the interest of the defendants Nos. 1. to 8. The defendant No. 22 (respondent No. 16), Kali Mohan Moitra, who as aforesaid was the owner of the zemindari right, had purchased the interest of the defendants 11, 12, 13 and 16 in putni tenure. Thus the putni interest was held by the respondents other than those numbered 2, 3, 14 and 15.

In the year 1891, Rai, Dhanpat Singh Bahadur, the husband of the above mentioned Rani Mina Kumari (the predecessor in title of the appellant) brought a rent suit (No. 171 of 1891) for the balance of rent due in respect of a 4 anna-share of the putni tenure against the then putnidar, the above mentioned Nur Mahomed Khan Choudhuri, whose predecessor, it was alleged, "took settlement of a 4 anna share of Dihi Haloti under a kabuliyat." On July 25, 1891 an *ex parte* decree was made in favour of the plaintiff in that suit.

In the year 1893, the above mentioned Uma Sankar Sen and Rajani Kant Sen sued (Suit No. 2 of 1893) the putnidar Nur Mahomed Khan Choudhuri for his 1 anna-share of the rent due and obtained an *ex parte* decree in their favour.

In the year 1896, the appellant and his vendee, the above mentioned Rani Mina Kumari, brought a rent suit (No. 7 of 1896) against the putnidars and cosharer zemindars as defendants. The claim was for the recovery of the entire rent due in respect of the whole putni tenure for the years 1299 to 1302 B. S. (April 1892 to April 1895) as well as for a declaration of their right to separately recover rent for the 6 anna-share they owned. The suit, as far as the rent of the whole putni tenure was concerned, was dismissed, but a decree was made for the 6 anna-share of the rent.

To the respondent zemindars the putnidars paid nearly the whole of the portion of the rent they were entitled to. To the appellant they paid no rent at all. He gave notice to the other zemindars asking them to join him in a suit for the arrears of rent due, and on their failure to do so, he instituted the present suit on April 17, 1900 in the Court of the Subordinate Judge of Rajshahye making all the putnidars and the co-sharer zemindars defendants thereto and claiming a decree for the whole rent due on the putni amounting to Rs. 27,324-3-9½. The plaint *inter alia* stated "that the plaintiff is entitled to realize separately his share of the money; but under the terms of the putni kabuliyat and according to the provisions of Act VIII of 1885 he is, according to law, entitled to bring a suit together with the co-sharer defendants for the whole of the rent and road-cess &c., as mentioned in the putni kabuliyat. On account of his realizing the amounts in proportion to his share, no departure has been made from the terms of the original kabuliyat." The appellant prayed in the alternative "that if for any valid reason a decree for the whole of the arrears of rent &c., due to the plaintiff and the co-sharer

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pro forma defendants could not be passed, then, a decree may be passed for Rs. 27,139-0-8½ due to the plaintiff's share with costs &c.

Respondents 1 and 4 filed written statements in answer to the suit and pleaded *inter alia* that "as the respective predecessors of the plaintiffs and of the *pro forma* defendants brought separate suits for arrears of rent, and acquired decrees on account of their respective shares, and also amicably realized the same by separately granting dakhilas in respect of the putni described in the plaint, the suit for arrears of rent brought by the plaintiff in its present form cannot proceed."

Of the issues fixed the following portion of the first issue is alone material for the purpose of this report :

"Is the plaintiff, who has hitherto received the rents in proportion to his share, competent to bring a suit for the whole rent which is due to all the shareholders?"

On December 17, 1900 the Subordinate Judge delivered his judgment and made a decree in favour of the appellant for his share of the arrears of rent due. On the issue set out above his decision was as follows :

"It appears from the decrees put in evidence by the defendants that the collection of the plaintiff's share is separate. This separated collection therefore gives rise to the presumption that by some arrangement which has been consented to by the co-sharers and the tenants, separate payment of a particular share of the rent has hitherto been made to the plaintiff. That being so, so long as the arrangement continues, the plaintiff is not competent to sue for the whole rent, even though the co-sharers are made parties to the suit. It is not the plaintiff's case that the arrangement has been put an end to by the consent of all the parties who originally concurred in it. Until this is done, the plaintiff is not entitled to bring a suit for the whole rent. The suit is not bad for misjoinder of parties, because the original contract in respect to the entire rent has not been put an end to. The plaintiff is however entitled to have a 6 anna-share of the rent which he is in the habit of collecting separately from the tenant defendants."

Against that decree, the appellant appealed to the High Court of Judicature at Fort William in Bengal. The appeal was heard by Ghose and Geidt, JJ. On April 28, 1904, Ghose J. delivered judgment affirming the decree of the Subordinate Judge, while Geidt J. delivered judgment reversing that decree. He was of

opinion that the appellant was entitled to a decree in a suit properly framed for the whole rent due as the only method by which he could enforce the statutory right conferred by the Bengal Tenancy Act of bringing the tenure itself to sale for the recovery of the arrears of rent due therefor. In consequence of the difference of opinion, the appeal was sent to Brett, J. for final disposal. On June 3, 1904, he delivered judgment and agreed with the judgment of Ghose, J., a decree was accordingly made dismissing the appeal with costs.

The appellant, therefore, appealed to His Majesty in Council.

Mr. Atkin, K. C. and Mr. DeGruyther for the Appellant:—

Under section 65 of the Bengal Tenancy Act (VIII of 1885) the landlord has no right to eject his tenant for arrears of rent, but the tenant's tenure or holding is liable to sale in execution of a decree for rent thereof and the rent is made a first charge on the tenure or holding. Why should one co-sharer landlord abandon this statutory right of his? Here, there is no dispute as to the fact of the rent being in arrears. Section 170 (1) of that Act enacts that sections 278 to 283 (both inclusive) of Civil Procedure Code shall not apply to a tenure or holding attached in execution of a decree for arrears of rent thereon. Chapter XIV of the Bengal Tenancy Act (S. 159 and the following sections) provides a method by which landlords after obtaining a decree for the rent can bring the tenure itself to sale in satisfaction for their decree, but in order to bring the tenure itself to sale, all the landlords must be parties to the suit, and the rent sued for must be the rent due in respect of the entire tenure and not in respect of a portion due to any particular share-holder. But these conditions have been fulfilled here. But it is contended by the other side that the suit would perfectly have been in order, were it not for the subsisting arrangement between the tenants and the landlords whereby the tenants have been paying rents to the landlords in proportion to the latter's share in the property.

[LORD ROBERTSON: The Subordinate Judge infers from previous suits that there was an arrangement, but there is nothing in evidence to show what that arrangement is.]

Mr. Atkin.—That is so, my Lord. If this contention were to prevail and the decision upheld, the arrangement would defeat the statutory right. Because in execution of a decree obtained by a fractional co-sharer for his share of the rent, only the right, title, and interest of the tenant can be sold. But there is really no evidence of the terms of this arrangement. Its existence has

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been merely inferred from the decrees showing that rent had been from time to time recovered separately. The arrangement, if any, only means that the tenants have agreed to pay separately to the various landlords the fractions of the rent proportioned to their respective interests in the property, and that the landlords have agreed to accept the rent paid in this manner. It does not amount to anything more. It refers to the method of payment only, and does not affect the rights and liabilities arising out of the kabuliyat under which the tenants hold their tenure. The cancellation and determination of the original lease ought not to be presumed from the mere fact of a separate payment of rent to one or more of the co-sharers: *Guni Mahomed v. Moran* and *Doorga Proshad Mytee v. Joyanarain Hazra* (1). It is conceded by the learned Judges below, that if all the landlords concurred in bringing the suit, the appellant could sue for the whole rent in respect of the tenure in spite of the arrangement. That shows that the arrangement does not interfere with the principle of the Bengal Tenancy Act and the appellant's right thereunder. Then the question is "can the arrangement prevent the appellant from suing when the other landlords do not consent?" It is submitted not. It is a general rule of the law of procedure, that one co-sharer can bring his co-sharers in the suit as defendants upon their refusal to join him as co-plaintiffs. Here the co-sharers refused to join the appellant and consequently he has joined them as defendants. Reference was also made to *Ram Coommar Ghose v. Kali Krishna Tagore* (2); Landlord and Tenant Procedure Act (VIII of 1869) B. C., sections 22, 59 and 14; Bengal Tenancy Act (VIII of 1885), section 188; Revenue Sale Law (Act XI of 1859), sections 6, 10 & 11; and Recovery of arrears of Land Revenue Act (Bengal Act VII of 1868), sections 9, 11 & 13.

Mr. Arathoon for the contesting Respondents:—I do not disagree with much of what the other side said. But the question, which is a much narrower one, is that so long as the agreement exists, the appellant could not sue in the present form, because until it is rescinded, he is legally bound by it. It is true that the agreement does not get rid of the tenure, but the question is, can the landlord enforce his rights under the Bengal Tenancy Act, while the arrangement exists? It is submitted that he could not. There is no question of harassing the tenant with several suits, as under the arrangement there could only be

(1) (1879) F. L. R. 4 Calo. 96.

(2) (1880) L. R. 13-I. A. 116.

one suit, while, under the Bengal Tenancy Act there could be several suits. So long as the arrangement remains in existence, the landlord could not come down suddenly upon the tenant and sue him for the whole rent of the tenure. The evidence shows that two different landlords sued two different tenants under two different arrangements for their separate shares of rents and obtained decrees. One of the suits was brought against the predecessor of the contending respondent, Raja Ramani Kanta Roy, and the claim, which was successful, was made under a kabuliyat, which means a written agreement. Again the evidence shows that the appellant had already brought in 1896 a suit for arrears of rent claiming that the putni tenure was liable for it. A decree was passed in it for the rent due to the appellant's share, and the Court held that the putni tenure could not be held liable for the appellant's claim for rent, and that the appellant had no power to bring any suit for the rent due in the 8 anna share. The present suit really raises the same question over again. It is submitted that the decision in that suit and also the decisions of the lower Courts in this suit are right. The decree in *Sheikh Naimuddin v. Srimanto Ghose* (1) was considered only a money decree.

[SIR ARTHUR WILSON : Because other landlords were not parties to the suit.]

If the appeal were allowed, the result would be that the landlord would have two concurrent rights, which the Legislature never intended at any time to give to the landlord. Is there any provision under the Bengal Tenancy Act, which gives the landlord the right claimed in spite of the arrangement without giving to the tenant any notice to rescind the arrangement? It is submitted there is no such provision in that Act. Reference was also made to *Rajnarain Mitter v. Ekadasi Bag* ; (2) *Beni Madhub Roy v. Jaod Ali Sircar* (3) and *Gopal Chunder Das v. Umesh Narain Chowdhry* (4).

Mr. Atkin replied.

The judgment of their Lordships was delivered by

Sir Arthur Wilson.—This appeal raises a question upon the construction and effect of the Bengal Tenancy Act, a short question, but one which may be of considerable importance wherever that Act applies.

The facts of the case are not in dispute, and are simple. In

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(1) (1901) 6 O. W. N. 124.

(2) (1899) I. L. R. 27 Calo. 479.

(3) (1890) I. L. R. 17 Calo. 390.

(4) (1890) I. L. R. 17 Calo. 695.

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the year 1837, the then owner of the zemindari interest in an 8 annas share in Dihi Haloti created a putni tenure in those 8 annas in favour of one Abbott, at a rent reserved. The zemindari and the putni interests both underwent subsequent devolutions, and at the time which is now material, the present plaintiff (appellant) held 6 annas of the zemindari interest, respondents 14 and 15 held 1 anna, and respondents 2, 3, and 16 one anna. The putni interest was held by the remaining respondents, and also by respondent 16. The last-mentioned, therefore, was interested both in the zemindari and in the putni. The putni rent fell into arrear so far as the share which should have come to the appellant was concerned.

The appellant thereupon brought the present suit on the 17th April 1900 in the Court of the Subordinate Judge of Rajshahye. He made the putindars defendants, and he joined as co-defendants his co-sharers in the zemindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for that purpose to bring to sale the tenure itself. But the plaint asked in the alternative for a decree for the plaintiff's share of the rent.

The Subordinate Judge refused to make a decree under the Bengal Tenancy Act for the whole putni rent, and gave a decree only for the plaintiff's share of the rent. On appeal, the case came before two Judges of the High Court, Ghose and Geidt JJ., who differed in opinion, Ghose J. holding that the view of the Subordinate Judge was correct, Geidt J. being of the contrary opinion. In consequence of this difference, the case was referred to a third Judge, Brett J., who agreed with Ghose J., with the result that the appeal was dismissed. Against that decision the present appeal has been brought, and it lies upon their Lordships to determine which of the views taken by the learned Judges ought to prevail.

Section 65 of the Bengal Tenancy Act enacts that :

"Where a tenant is a permanent tenure holder.....he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

Section 159 and the following sections provide the means and procedure for so bringing the tenure to sale, and for the cancellation of incumbrances thereupon. The only other section which it is necessary to refer to is section 188, which says that :

"Where two or more persons are joint landlords, anything which the landlord is under this Act required or authorized to do must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them."

By the express terms of the Bengal Tenancy Act, in the event of rent being unpaid, the owners of the zemindari interest are entitled, by suit under that Act, to bring a putni to sale, with the consequences prescribed by the Act. And it is a general rule, a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure, that a sharer, whose co-sharers refuse to join him as plaintiffs, can bring them into the suit as defendants, and sue for the whole rent of the tenure. This must apparently be the law applicable to the present case, unless there be something to exclude the case from the operation of these general rules.

For the purpose of this exclusion, what was relied on was this: it was said that, by express or implied agreement between the zemindars and the putindars, the shares in the putni rent of the several zemindars were to be paid, and so far as they were paid at all, were, in fact, paid separately; and it was contended that that agreement, on the one hand, entitled the separate zemindars to sue for their separate shares, and to bring to sale the right, title, and interest of the putindars, but, on the other hand, either precluded the zemindars altogether from obtaining a decree under the Bengal Tenancy Act for the rent as a whole, or at any rate, prevented one of the zemindars from doing so by making his co-sharers defendants.

This was the contention which prevailed with the Subordinate Judge and with two out of the three Judges in the High Court.

The evidence of the alleged agreement consisted of certain decrees, which seemed to show that the shares of the rent had been from time to time separately recovered. It has long been held in Bengal, that agreement, either expressly proved or implied by the conduct of the parties, may establish the right to sue separately for the shares of rent receivable by the separate shareholders; and their Lordships have no inclination to question that course of rulings.

But it has been equally clearly laid down in Bengal, that such an arrangement, expressed or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding; and their Lordships think that this is clearly a sound view of the law. And it appears to their Lordships to be

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sufficient ground upon which to decide this appeal, for it follows, from the propositions referred to, that the right to bring the tenure to sale for arrears of rent remains intact, and also the right of one sharer to sue, making his co-sharer defendants when they will not join as plaintiffs.

It only remains to notice section 188 cited above. It was suggested in argument that this section precludes a suit under the Act, for the aggregate rent of the tenure, unless all those entitled to share in the rent join as plaintiffs. Their Lordships are not impressed by this argument. The filing of a suit is not a thing which the landlord is, under the Act, required or authorised to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision of the Tenancy Act, but under the general law.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of both Courts in India should be discharged, and that instead thereof it ought to be declared that the appellant is competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due in respect of the property in suit, that the case ought to be remitted to the High Court to take the necessary steps for the disposal thereof on the footing of the above declaration, and that the respondents who defended the appeal to the High Court ought to pay the costs thereof, and that the costs in the Court of the Subordinate Judge ought to be dealt with by that Judge on the above footing.

The respondents who defended this appeal will pay the costs of it.

Messrs. Downer and Johnson: Appellants' Solicitors.

T. L. Wilson & Co.: Solicitors for Respondents Nos. 1, 2, 3 and 16.

Other respondents did not appear.

J. M. P.

Appeal allowed: Case remanded.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis William Maclean, K. C. I. E., Chief Justice,
Mr. Justice Harington and Mr. Justice Fletcher.*

SRIMATI INDRA BIBI

v.

JAIN SIRDAR AHIRI AND ANOTHER,*

*Indian Registration Act (III of 1877), sections 17, 21, 49—Attorney, power of,
to create a charge on immovable property.*

Where a power of attorney was executed by A in favour of B to enable B to recover the rents and profits of the properties of which A was the administrator, in order to pay off an amount advanced by B to A as such administrator :

Held, that in as much as the document was entered in Book IV instead of Book I, it was not registered according to the provisions of the Registration Act, and therefore could not affect immovable property.

Najibulla Mulla v Nasir Mistri (1) referred to.

Appeal from Original Decree by the Plaintiff.

The facts in this case are as follows :

The plaintiff was the administratrix of the estate of her late husband Bissesswar Dass, and sued for a declaration of a charge on the estate of one Sitab Chand Ahiri deceased. The defendant Jain Sardar Ahiri was the administrator of the estate of Sitab Chand Ahiri, and the defendant Dhunwa Bibee was the sole beneficiary. The plaintiff claimed that her husband advanced moneys amounting to about Rs. 5,000, to the defendant Jain Sardar for the purposes of the administration of the estate of Sitab Chand Ahiri, and these advances were not denied by the said defendant. It was also admitted that on the 5th of August 1898, the said defendant executed in favour of the said Bissesswar Dass a general power of attorney to enable him to recover the rents and profits of the properties of which the said defendant was the administrator, in order to recoup himself for the advances which he had made. It was by virtue of this power of attorney, that the plaintiff claimed to have a charge upon the estate of the said Sitab Chand. It was also admitted that no leave of the Court was obtained before the power of attorney was executed. The document was stamped and registered in Book IV as a power of attorney. It did not contain a description of the property said to be affected sufficient to identify the same (section 21 of the Registration Act), nor was it entered in Book I under

* Appeal from the judgment of Chitty, J. dated 20th May 1907.

(1) (1881) I. L. R. 7 Cal. 196.

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section 51. The lower Court held that under the circumstances, the document was not properly registered, and, therefore could not create an interest in immovable property. From this judgment the plaintiff appealed.

Mr. S. P. Sinha (with Mr. B. K. Acharya) for the Appellant.

Mr. A. Chowdhury (with Mr. Mehta) for the Respondent Dhunwa Bibee.

Mr. A. N. Chowdhury for the Respondent Jain Sardar.

Mr. S. P. Sinha :—In England, a power of attorney does create a charge. See *Bennet v. Cooper* (1), *In re Parkinson* (2), *Abbott v. Stra.ten* (3).

This document has been copied into Book IV instead of in Book I. That is an administrative act done by the Registrar. The parties have nothing to do with it. Explains the scheme of the Registration Act. The case of *Najibulla v. Nusir Mistri* (4) is apparently against us. But it has been doubted. See Holmwood's Registration Act.

Mr. A. Chowdhury :—This document does not state the property which it is alleged has been charged. See section 21 of the Registration Act. Moreover, the administrator did not come to Court for leave to create a charge. He purported to do that by a power of attorney.

Mr. Sinha in reply.

The judgment of the Court was as follows :

Maclean C. J.—The only question we have to decide upon this apcal is whether the power of attorney of the 5th of August 1898 created a charge on the properties generally referred to in it, securing to the applicants' husband, whose representative she now is, certain monies which she says were advanced for the purposes of the estate. I am doubtful, looking into the language of the document, whether it constitutes an equitable charge, seeing that any money to be received by the attorney in whose favour the power was given was to be paid not to himself but into the Bank, not in his own name but in the name of the person giving the power. I will, however, assume in favour of the appellant, that the document did constitute an equitable charge in favour of the person to whom the power was given, but even then, the want of registration in compliance with the provisions of the Registration Act is fatal to the plaintiff's case. It is quite clear under section 17 of that Act, that if the document was one which purported to

(1) (1845) 9 Beav. 252.

(2) (1865) 13 L. T. 26.

(3) (1846) 3 J. & La T. 603.

(4) (1881) I. L. R. 7 Calc. 196.

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affect, or to create any interest in, immovable property, it was bound to be registered; section 49 says that "No document required by section 17 to be registered shall affect any immovable property comprised therein, unless it has been registered in accordance with the provisions of this Act." When we look into the circumstance of this case, it appears that the document in question has not been registered in compliance with the provisions of the Act. It was admittedly stamped only with the stamp required for a power of attorney and not for a document creating an equitable charge, and it was, apparently, so presented to the registering officer. If it was an equitable charge, it is quite clear that it ought to have been entered in Book I, and certain particulars which are compulsorily required by section 21 of the Act relating to immovable property ought to have been furnished. Section 21 says that "No non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same." That was not the case here—there was no such description—and in point of fact, the document was entered not in Book I, which is a Register of non-testamentary documents relating to immovable property but was entered in Book IV which is a "Miscellaneous Register." The case of *Najibulla v. Nasir Mistri* (1) is akin to the present. But, to my mind, it is sufficient to say that the document was not registered in accordance with the provisions of the Act, and, therefore, under section 49, it could not affect any immovable property comprised therein. I, therefore, think that the view taken by Mr. Justice Chitty is quite correct, and this appeal must be dismissed with costs.

Harington J.—I agree. I will only add the observation that the fact that the parties accepted the document with an endorsement showing that it had not been registered in Book I and the fact that no leave was obtained under section 90 of the Probate and Administration Act lead to the conclusion that the parties did not intend to create a charge by the document which was executed. For these reasons, I think the appeal should be dismissed.

Fletcher J.—I also agree.

Mr. G. K. Ghose—Attorney for the Appellant.

Messrs. Bonnerjee and Halder—Attorney for the Respondent.

(1) (1881) L. L. B. 7 Calc. 196.

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APPELLATE CIVIL.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

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v.

ASRAF ALI MANDAL AND OTHERS.*

Forest-right, lease of—Suit for money due as price of trees—Damages for breach of contract—Suit for arrears of rent—Limitation, no admission, raised in appeal.—Bengal Tenancy Act (VIII of 1885), Secs. 144, 184, 193, Sch. III, Art. 2,—Grant to cut timber of a certain size, of limited rights, construction of—Jurisdiction, local, consent cannot confer, may be raised in appeal.—Code of Civil Procedure (Act XIV of 1882), Sec. 16 A, 17, 57.—Procedure, when Court's jurisdiction is doubtful—Plaint, return of, when proper.

A grant of the right to fell timber of a particular class and specified size during a defined period of time, though extremely restricted in its scope, which prohibited the lessee from doing any damage to the *bankar mahal* i.e. to the forest, and imposed upon the lessee a condition to notify to the Court any occurrence which might happen, and though it obviously granted no interest in the soil itself, was obviously a grant of the most valuable of the forest rights; it cannot be regarded as a sale of timber.

Gopal Singh v. Sunkuree Paharin (1) distinguished.

A grant of a fishery right or right of pasturage or the like may be made independently of an interest in land.

Shib Prosad Chaudhuri v. Vakai Pali (2) referred to.

A grant of the trees as distinct from the land in which the grantor reserves every forest right except the one which is granted, is nevertheless the grant of a forest right within the meaning of section 193 of the Bengal Tenancy Act; and a suit for the recovery of money payable in respect of such forest rights is governed by the three years' rule of limitation laid down in Schedule III, Art. 2, Cl. (b) of the Act.

The provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent are, having regard to the phraseology of section 193 of the Act, designedly made applicable to suits for the recovery of sums that are not rent; and money payable in respect of forest-rights is not rent within the meaning of section 3 (5) of the Act.

The question of limitation, raised in the written statement but abandoned in the Court of first instance, is a clear question of law, and it could be raised in the Court of appeal.

Under section 184, sub-section (1) of the Bengal Tenancy Act, it is obligatory upon the Court to dismiss the suit on the ground of limitation, although limitation has not been pleaded.

Deo Narain v. Webb (3) and *Balaram v. Mangta Das* (4) referred to.

* Appeal from Appellate Decree No. 1805 of 1905, against a decree of J. E. Webster, Esq., District Judge of Mymensingh, dated the 3rd. August 1905, reversing that of Babu Ananda Nath Majumdar, Subordinate Judge of Mymensingh, dated the 2nd. May 1905.

(1) (1875) 23. W. R. 458.

(2) (1906) I. L. R. 33 Calc. 601.

(3) (1900) I. L. R. 28 Calc. 86.

(4) (1907) 6 C. L. J. 237.

Refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court, specially where the question of limitation obviously arises upon the admitted facts of the case.

Harihar v. Dasarathi (1), *Maharani Beni Pershad v. Duddh Nath Roy* (2), and *Raja Bommadevara v. Raja Bommadevara* (3) referred to.

Although standing timber is movable property within the meaning of section 3 of the Indian Registration Act, yet under section 3, clause 25 and section 4 of the General Clauses Act, of 1897, standing timber is immovable property within the meaning of the Civil Procedure Code.

Jaimal Singh v. Ladha (4), *Ram Ghulam v. Manohar Das* (5), *Sakharam v. Vishram* (6), *Madayya v. Yenkata* (7) referred to.

Growing trees may be regarded as part of the soil and consequently immovable property.

Hewitt v. Isham (8) referred to.

But where under a contract the grantee has no right to the soil, takes no interest in the land and obtains a right to the trees with a view to fell them immediately or within a reasonable time, without any stipulation for the beneficial use of the soil but with a license to enter and take the trees away, the transfer may be regarded as one of movables.

Smith v. Surman (9) referred to.

If a Court of appeal decides that the original Court had no jurisdiction to entertain the suit, the right course to adopt is to return the plaint for presentation to the proper Court.

Edoo v. Hefazut (10), and *Bai Mahkor v. Bulakhi* (11) referred to.

Consent of parties cannot confer jurisdiction upon a Court, where it has not inherent jurisdiction over the subject matter of the litigation, and the judgment of a Court which lacks this essential jurisdiction, is totally void and this would not be cured by waiver or acquiescence.

Ledgard v. Bull (12), *Meenakshi v. Subramanya* (13) *Golab Sao v. Choudhury Madho Lal* (14), and *Gurdeo Singh v. Chandrikah Singh* (15) referred to.

Where, however, the defect is not apparent on the face of the proceedings, where specially the question of jurisdiction depends upon a fact, the existence of which is alleged by one of the parties in the Court of first instance and not controverted by the other, it is not obligatory upon a superior Court to enter into the

- (1) (1905) I. L. R. 33 Calc. 257 (263).
- (2) (1899) L. R. 26, I. A. 216; I. L. R. 27 Calc. 156.
- (3) (1902) L. R. 29, I. A. 76; I. L. R. 25 Mad. 367.
- (4) (1884) Punj. Rec. 112.
- (5) (1887) 7 All. W. N. 69.
- (6) (1894) I. L. R. 19 Bom. 207.
- (7) (1887) I. L. R. 11 Mad. 193.
- (8) (1851) 7 Exch. 77; 86 R. R. 576.
- (9) (1829) 9 B & C. 561; 33 R. R. 259.
- (10) (1870) 13 W. R. 358.
- (11) (1874) I. L. R. 1 Bom. 538.
- (12) (1886) L. R. 13, I. A. 134; I. L. R. 9 All. 191.
- (13) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.
- (14) (1905) 2 C. L. J. 384.
- (15) (1907) 5 C. L. J. 611.

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question, specially where, in order to adjudicate upon the question satisfactorily, a further investigation of the facts would be essential.

Maraden v. Wardle (1), *Farquharson v. Morgan* (2) *Naimuddoe v. Moncrieff* (3) referred to.

If the want of jurisdiction appeared on the face of the pleadings or the admission of the parties or upon the evidence, the question could not only be raised in appeal for the first time, but it would be the duty of the Court to entertain it.

Achha Mian v. Durga Churn Law (4) referred to.

When an objection as to jurisdiction is taken for the first time before the appellate Court, and it becomes at least one upon which there is a reasonable ground for uncertainty, the Court should proceed under sub-section 2 of section 16 A of the Civil Procedure Code and refuse to allow the objection to be taken at the appellate stage.

Shibu Halder v. Gupi Sundari (5) referred to.

Appeal by the Plaintiff.

Suit for recovery of money due under the terms of a kabuliyat or lease for felling timber of a certain description and size.

The facts of the case appear fully from the judgments.

Babus Dwarka Nath Chakravarty and *Tarak Chandra Chakravarty* for the Appellant.

Babu Gobinda Chanara Dey Roy for the Respondents.

C. A. V.

The following judgments were delivered :

August, 1.

Stephen J.—The suit in this case was brought by the plaintiff appellant to recover Rs. 5,000 on a document, dated the 24th February 1897 by which the plaintiff gave the defendant leave to cut in his forest trees of a girth of more than 18 inches, for three years from 13th March 1897 till 13th March 1900, on a payment of a sum of Rs. 1,000 on each of three named dates, the last of which was 16th October 1898. Interest was to be at the rate of Rs. 6-4-0 a month. The plaintiff brought his suit on the 7th October 1904, that is, after the last payment became due, and, allowing for part of his debt being barred by limitation, sued for Rs. 5,000. The defendant pleaded payment, and also that by force of section 193 of the Bengal Tenancy Act, the suit was one for arrears of rent within the meaning of Schedule III of that Act. On both points, the lower appellate Court, the District Judge of Mymensingh found in his favour, reversing the decision of the Sub-Judge. He also found in his favour, on a point of jurisdiction that had not been taken by the Subordinate Judge but

(1) (1854) 3 E & B 695 (701).

(3) (1869) 3 B. L. R. 288.

(2) (1894) 1 Q. B. 552 (562).

(4) (1897) I. L. R. 25 Calc. 146.

(5) (1897) I. L. R. 24 Calc. 449.

was raised before him by the defendants, the then appellants. This was, that as section 193 of the Bengal Tenancy Act applies to the case, section 144 would also apply, and, as the trees grew in Dacca, the Subordinate Judge of Mymensingh had no jurisdiction to deal with the case.

Dealing first with the finding as to payment, it is to be observed that it was unnecessary for the Judge to come to any finding on this point, as he had decided the case already on the other two. The finding is, however, in itself, a weak one and is open to the objection which was not noticed by the District Judge, that it is not conclusive, because, as may be shown by an easy calculation, if all the payments pleaded by the defendant were made and the Judge's findings do not apply to any others, there was still something due to the plaintiff for interest at the time the suit was brought. As however, I am of opinion that the suit must fail on the point of limitation, this is of no importance. The other two points have formed the chief matter of argument before us, and the most convenient method of discussing them will be first to consider the application of the Bengal Tenancy Act to the case, which depends on the construction to be placed on section 193, for unless that section applies, there can be no question of the applicability of section 144 on which the question of jurisdiction depends. Section 193 is as follows :

"The provisions of this Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest rights, rights over fisheries and the like." This admittedly makes the rule of limitation contained in section 184 applicable to the suits mentioned, and the question is whether the present suit is one for the recovery of anything payable in respect of any forest rights. The plaintiff appellant contends that the document on which his claim is based, the deed of 25th February 1900, does not affect any forest rights but is merely a sale of such trees within the places referred to, as are or may, within the named period, grow to a certain size. The defendant respondent, on the other hand, maintains that a general right to cut trees in a forest, though it is subject to a general restriction as to the trees to be cut, is a forest right within the meaning of the section.

The material portions of the document in question are that the purchasers may cut and take away any trees of more than

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18 inches in girth ; but if they cut any others or " do any damage to the *bankar mehal* of the said place," they and their heirs are to pay twenty times in value of the trees cut. The defendants are to report to the Court any incident occurring in the forest that ought to be brought to its notice during the term of the document, and there is a not very clear provision which seems to provide that the defendants are to pay any thing then due from other persons in respect of trees already cut by them. The provisions of the document are to apply to the heirs of both parties. This certainly falls a long way short of giving the defendants any right to the possession of the land of the forest ; and, in fact, gives them only one rather carefully restricted right. At the same time, that right is the only right that would be of any substantial value to the lessee of the forest for a short term, and probably to the owner. It is certainly a right that would pass under a demise of the forest rights ; and I cannot consider that it is materially diminished by the general obligation not to do damage to the *bankar mehal*, any more than that it is materially increased by the obligation to report forest offences to the Court. The provisions of section 193 as to rights of pasturage and rights over fisheries, coupled as they are with forest rights, support the view that the limitation of the defendants' rights does not prevent their being forest rights, since both these rights may obviously be limited in various ways and neither would give to the persons who enjoyed them any interest in the land on which these were to be enjoyed. The case of *Gopal Singh Moorah v. Sunkuree Paharin* (1) has been quoted to show that the present rights are not such as that section 193 will apply to them. But what was held there was that money payable for a right to collect lac insects was not rent for land under Act X of 1859, and that, therefore, a suit for enhancement of such payment did not lie under that Act. No question of forest rights was raised and the case does not therefore seem to me to be applicable here.

I hold therefore that the defendant enjoyed a forest right, and that this suit being for the recovery of money payable in respect of it, the provisions of the Bengal Tenancy Act applicable to suits for recovery of arrears of rent apply to this suit "as far as may be."

I have to add that what is referred to in section 193 as "anything payable or deliverable" in respect of rights of pasturage etc., is, in my opinion, designedly inclusive of much that is not rent, if it is not exclusive of rent, and that in this case, the money pay-

(1) (1875) 23 W. R. 448.

able by the defendant under the agreement in question is not rent. A right to take trees, even though it implies a right to pass over land, is not a right to the use or occupation of land and money paid in respect thereof is therefore not rent within the meaning of section 3 (5) of the Bengal Tenancy Act. This is more clear on a reference to Act X of 1859, section 23 (5), whereby it was provided that suits for arrears of rent due on account of land "or on account of any rights of pasturage, forest rights, fisheries, or the like" were to be tried under the provisions of that Act, which, it may be noted, contained in section 33 a rule as to limitation resembling that in Schedule III of the present Act. The old Act, however, contained no definition of rent, and when rent was defined in the present Act, it was considered necessary to separate the provisions as to the rights mentioned from those relating to rent generally; this shows that it was considered that payments in respect of such rights were not rent; but it was considered desirable to treat them as rent "as far as may be."

There is no doubt that if section 193 applies to this case, the suit is barred by the three years' limitation provided by Schedule III of the B. T. Act. But this brings us to the second point, that namely, of jurisdiction. Among the provisions of the B. T. Act applicable to suits for the recovery of arrears of rent and made applicable as far as may be by section 193 to suits for the recovery of something payable in respect of forest-rights, is section 144. That section provides that "the cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court which would have jurisdiction to entertain a suit for possession of the tenure or holding in connection with which the suit is brought." There is not much difficulty in treating the vendor as landlord and the purchaser as tenant, and the suit as one between landlord and tenant as such. We have then to consider what we are to regard as the equivalent of "the tenure or holding in connection with which the suit is brought." It is not easy to render an exact equivalent for the words 'tenure or holding'; but unless we are to hold the section inapplicable, a suit for the possession of tenure or holding must apparently be the same as a suit for the possession of the trees in question, taking the trees to partake of the immovable character of a tenure, whether they actually are immovable or not by the effect of section 3 (25), and section 4 of the General Clauses Act, 1897. The awkwardness of this construction would lead me to have some

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doubt as to its propriety, were it not that I consider that the present case is covered by the judgment of Banerjee, J. in *Shibu Hal-dar v. Gopi Sundari Dasi* (1), where section 144 was held to apply to a case of a fishery right, and it does not appear that the holder of the right had any interest in the land where it was enjoyed. Apart from that authority, too, it is desirable that as many cases as possible arising under section 193 should be treated in the same way, and a liberal construction ought, therefore, to be given to the limitation conveyed in the words "as far as may be." The result is, that by force of section 16 C. P. C. the suit must be instituted in the Court within the local limits of whose jurisdiction the trees were situated. And, here, we are met with a question of fact. The question of jurisdiction was not raised in the first Court. The District Judge dealing with the matter on appeal, a course which he was justified in pursuing by the decisions in *Ledgard v. Bull* (2) and *Achha Mian Chowdhry v. Durga Charan Law* (3), held that the trees were situated at Dacca, because of a recital to that effect in the deed of agreement relating to the trees. He overlooked the facts, however, that they are stated in the plaint to have been in Mymensingh and that this is not denied in the written statement. The correct procedure for him to have followed in these circumstances would, no doubt, have been to have proceeded under section 16A (2), C. P. Code, which he apparently did not do. On his own findings, he should, therefore, have returned the plaint to be presented in the proper Court under section 57, C. P. C. The suit being one over the subject-matter of which the two Courts below had, in one view of the case, no inherent jurisdiction, it is our duty to consider the point and it might be our duty to return the plaint ourselves. But the question of fact is at best doubtful, and holding as I do, that the suit is, in any case, barred by limitation, it seems to me that no useful end is to be gained by taking any steps to solve that doubt. The result is, that the question of jurisdiction in all its bearing must remain undecided and the plaintiff's case fails on the point of limitation. This appeal is, therefore, dismissed with costs.

Mookerjee J.—The litigation out of which the present appeal arises was commenced by the plaintiff appellant to enforce his rights under a kabuliati executed in favour of his father by some of the respondents and predecessors of the others on the

(1) (1897) I. L. R. 24 Calc. 449.

(2) (1888) I. L. R. 9 All. 191; L. R. 13 I. A. 184.

(3) (1897) I. L. R. 25 Calc. 146 at 151.

24th February 1897. Under the kabuliat, the defendants obtained the right to fell trees of a certain class and size in a forest, owned by the plaintiff, during a period of three years from the 13th March 1897 to the 13th March 1900. The consideration for the lease was a sum of Rs. 4,000 of which Rs. 1,000 was paid before the execution of the lease and the remaining three thousand was to be paid in three equal instalments on the 16th of October 1897, 12th of April 1898 and 16th of October 1898. There was a covenant to pay interest at the rate of 75 per cent. per annum in case of default of payment on the specified dates. The present suit was instituted on the 7th October 1904 for recovery of a sum of Rs. 5,000, which represented the principal amount due for the last instalment together with interest at the contract rate. The defendants resisted the claim on various grounds amongst which it is sufficient to mention the pleas of limitation and payment. The defendants contended that the suit was in substance one for recovery of arrears of rent within the meaning of the Bengal Tenancy Act, and that it was consequently barred by limitation inasmuch as it had been commenced more than three years from the end of the agricultural year in which the last instalment of rent fell due; they also alleged that the whole of the sum due under the contract had been paid and an acquittance granted to them, by the father of the plaintiff. Before the Subordinate Judge who tried the case in the first instance, the plea of limitation was abandoned. He found upon the evidence that the alleged payments were not established and consequently made a decree in favour of the plaintiff. Upon appeal by two of the defendants, the District Judge found that the suit was barred by limitation as it was brought more than three years from the end of the agricultural year in which the instalment claimed fell due; he also found that the Subordinate Judge had no jurisdiction to try the suit inasmuch as the trees grew on land situated within the jurisdiction of the District Court of Dacca. As regards the plea of payment, he found that it had been established by the evidence, but he did not consider whether the sums alleged and proved to have been paid were sufficient to discharge the debt. In this view of the matter, he reversed the decision of the Subordinate Judge and dismissed the suit. The plaintiff has now appealed to this Court, and on his behalf, the decision of the District Judge has been challenged, substantially on three grounds, *namely, first*, that the suit is not barred by limitation, as it is one for recovery of price of trees which had been sold to the

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defendants and was in no sense a suit for rent ; *secondly*, that if the Court of the Subordinate Judge of Mymensingh had no jurisdiction to try the suit, the District Judge ought to have returned the plaint for presentation to the proper Court without any adjudication on the merits of the controversy between the parties ; and, *thirdly*, that the facts found by the District Judge in relation to the plea of payment set up by the defendants are not sufficient to show that the debt due to the plaintiff has been completely extinguished, and that in reality, if an account be taken on the footing that all the sums alleged by the defendants have been duly paid, a large amount would be found due to the plaintiff. As regards this last ground, it is sufficient to state that there is considerable force in it. In fact, it is clear from the facts which have been found by the District Judge, that even if the plea of payment set up by the defendants be considered to have been established, the amounts paid are not sufficient to satisfy the debt as they just cover the principal, but are not sufficient to satisfy the whole of the interest due under the contract. It is not necessary, however, to deal with this question at any length because as will presently be seen, the suit must fail on the ground of limitation.

As regards the questions of limitation and jurisdiction, their solution depends upon the nature of the right created by the grant in favour of the defendants. According to the plaintiff, the transaction was in substance a contract of sale of timber, and the claim which the plaintiff seeks to enforce is, in form as well as in essence, a suit for recovery of damages for breach of contract in writing and registered. The defendants, on the other hand, contend that the grant was in reality one of forest rights, that the suit is in substance one for the recovery of money payable in respect of forest rights and that, consequently, under section 193 of the Bengal Tenancy Act, the provisions of the Act applicable to suits for the recovery of arrears of rent which include Article 2 of Schedule III are applicable to the present suit. To determine which of these contentions ought to prevail, we have to examine, in the first instance, the terms of section 193, which provides as follows : " The provisions of this Act applicable to suits for the recovery of arrears of rent shall, as far as may be, apply to suits for the recovery of anything payable or deliverable in respect of any rights of pasturage, forest-rights, rights over fisheries and the like. It is obvious from the phraseology of this section, that the provisions of the Act applicable to suits for the

recovery of arrears of rent are made applicable to suits for the recovery of what is not rent ; because if what is payable or deliverable in respect of any rights of pasturage, forest-rights, rights over fisheries and the like, had been rent within the meaning of section 3, clause 5 of the Bengal Tenancy Act, section 193 would have been wholly unnecessary. "Rent" is defined to mean, whatever is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of land held by the tenant. A "tenant" is defined in clause 3 of section 3 to mean a person who holds land under another person, and is, or, but for a special contract, would be, liable to pay rent for that land to that person. It is obvious consequently, that the essence of rent is that it should be payable in respect of the use or occupation of land by a person who holds that land. The term, therefore, as defined in section 3 cannot be made applicable to sums recoverable in respect of rights of pasturage, forest-rights, rights over fisheries and the like ; because in each of these cases the rights may be held independently of any interest in land, that is, by a person who has no right to the land, over which the right of pasturage or forest-right or fishery right is exercised. The scope and object of section 193 becomes manifest by a reference to section 23, clause 4 and section 32 of Act X of 1859, the provisions of which are substantially reproduced in section 193 and clause 2 of Schedule III of the Bengal Tenancy Act. Section 23, clause 4 of Act X of 1859 lays down that all suits for arrears of rent due on account of land, either *kheraj* or *lakheraj*, or on account of any rights of pasturage, forest-rights, rights over fisheries or the like, shall be cognizable by the Collector of land revenue, and shall be instituted and tried under the provisions of that Act. Under this Act it was held that a suit for *falkar*, that is, money payable for fruits of trees which had been leased out was cognizable by a Revenue Court and not by a Court of Small Causes, and it has been held that the provisions of the Bengal Tenancy Act are applicable to a suit for recovery of such sums : *Gobind Sookul v. Gokool Bhukut* (1) and *Kanai Moholder v. Madhu Sudan Ghose* (2). It is obvious, therefore, that so far as suits for arrears were concerned, rent due on account of land stood on the same footing as rent payable on account of rights of pasturage, forest-rights, fishery-rights or the like. Under Act X of 1859, section 32, which prescribed the time for the commencement of suits for arrears of rent, provided that

(1) (1875) 23 W. R. 304.

(2) (1907) 6 C. L. J. 609.

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suits for the recovery of arrears of rent shall be instituted within three years from the last day of the Bengali year in which the arrear claimed shall have become due. This made the same rule of limitation applicable to all suits for arrears of rent, whether they were due on account of land or on account of rights of pasturage, forest-rights, fisheries and the like. When the Bengal Tenancy Act was passed, the term rent was defined, and the definition, as it now stands, restricts the use of the term to what is payable or deliverable in money or kind on account of the use or occupation of land. It became consequently necessary, if the law as laid down in Act X of 1859 was not to be substantially changed to introduce section 193, the effect of which is to make the provisions of the Act applicable to suits for the recovery of arrears of rent, apply to suits for the recovery of any thing payable in respect of rights of pasturage, forest-rights, fishery-rights and the like. It is reasonably clear, therefore, that, if the present suit is one for the recovery of money payable in respect of forest-rights within the meaning of section 193 of the Bengal Tenancy Act, it is governed by the three years' rule of limitation laid down in Schedule III, Art. 2, clause (b) of the Act. The learned vakil for the plaintiff appellant contends that the suit is not one for the recovery of money payable in respect of forest-rights but is essentially an action for the recovery of money agreed upon as the price for the sale of timber. In my opinion, this contention is not well-founded and ought not to prevail. It may be conceded that the deed of the 24th February 1897 is not a grant of all forest-rights to the defendants; it was extremely restricted in its scope. It granted one right only, *viz*, the right to fell timber of a particular class and specified size during a defined period of time. There was also an express undertaking by the lessee not to do any damage to the *bonkar mahal*, *i.e.* to the forest, and the lessees also undertook to notify to the Court any occurrence which might happen. They were obviously granted no interest in the soil itself. Under these circumstances, can it be legitimately contended that there was no grant of a forest-right and that the transaction was in essence a sale of timber? In my opinion, such a view cannot be successfully maintained, though the grant was very limited in scope, it was obviously a grant of the most valuable of the forest rights; it cannot be regarded as a sale of timber; the trees were not specified and the grantee was clearly entitled to fell timber which might attain the prescribed size at any time within the specified period.

Reference was made on behalf of the appellant to the decision of this Court in the case of *Gopal Singh v. Sunkuree Paharin*, (1) which, however, is of no assistance to him. That case merely laid down that where a tenant of a lease was entitled to collect certain lac insects from trees growing in the forest belonging to the plaintiff, he was not a lessee of land, and a suit was not maintainable to enhance his rent under Act X of 1859, because in substance, such a suit would be one for enhancement of the rent, not in respect of land but on account of a certain right. Here the whole question is, not whether there was a lease of land but whether there was a grant of forest-right in respect of which money was payable, so that to a suit for the recovery of such money the provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent might be applied under section 193. That a grant of a fishery-right or right of pasturage or the like may be made independently of a grant of an interest in land is clear from the observations of the learned Judges of this Court in the case of *Shib Prosad Chaudhury v. Vakai Pali* (2). It seems to me to be manifest from the grant of the 24th February 1897, that it was a grant of the trees as distinct from the land, and that, although the grantor reserved every forest-right except the one which was granted, the grant was nevertheless the grant of a forest-right within the meaning of section 193. In this view of the matter, Schedule III, Art. 2, clause (b) applies, and the suit is clearly barred by limitation. It may be observed that the question of limitation, though raised in the written statement of the defendants, was abandoned in the Court of first instance. The question, however, was clearly one of law and could be raised in the Court of appeal, *first*, because, under section 184, sub-section (1) of the Bengal Tenancy Act, it is obligatory upon the Court to dismiss the suit on the ground of limitation, although limitation has not been pleaded : *Deo Narain v. Webb* (3), and *Balaram v. Mangta Das* (4), and *secondly*, because, the refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court : *Harihar v. Dasarathi* (5), *Maharani Beni Pershad v. Dudh Nath Roy* (6) ; this is specially so, where, as here, the question of limitation obviously arose upon the admitted facts of the case : *Raja Bommadevara v. Raja Bommadevara* (7).

(1) (1875) 23 W. R. 458.

(4) (1907) 8 C. L. J. 237.

(2) (1906) I. L. R. 33 Cal. 601. (5) (1905) I. L. R. 33 Cal. 257 at 263.

(3) (1900) I. L. R. 28 Cal. 86. (6) (1899) L. R. 26 I. A. 216 ; I. L. R. 27 Cal. 156.

(7) (1902) L. R. 29 I. A. 76 ; I. L. R. 25 Mad. 367.

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The next point which is urged on behalf of the appellant is that if the suit is one for the recovery of money payable in respect of forest-rights, and if, therefore, under section 193 of the Bengal Tenancy Act, the provisions of the Act applicable to suits for the recovery of arrears of rent apply, as far as may be, section 144, is applicable, the Subordinate Judge had no jurisdiction to try the suit. It is argued, therefore, that it is the duty of this Court to return the plaint for presentation to the proper Court under section 57 of the Civil Procedure Code. Now there can be no doubt, as laid down in the cases of *Edoo v. Hefazut* (1), *Bai Mahkor v. Bulakhi* (2), that if a Court of appeal decides that the original Court had no jurisdiction to entertain the suit, the right course to adopt is to return the plaint for presentation to the proper Court. We must, therefore, examine the contention as to the precise effect of Sec. 144 of the Bengal Tenancy Act. With reference to this argument, it has to be observed that section 193 does not make all the provisions of the Bengal Tenancy Act applicable, but only such as are applicable to suits for recovery of arrears of rent, and the application of even these is restricted by the condition that they are to be applied, as far as may be; for instance, it may well be contended that provisions of Chapter XII which relate to distrains, of Chapter XIV which relate to sales of tenures for arrears of rent may not be applicable, and the provisions of Chapters V and VI, many of which relate to substantive rights and liabilities, may also be not applicable at all. We must, consequently carefully examine the terms of section 144 to determine whether it has any application to the present suit. Section 144 provides that the cause of action in all suits between landlord and tenant as such shall, for the purposes of the Code of Civil Procedure, be deemed to have arisen within the local limits of the jurisdiction of the Civil Court, which would have jurisdiction to entertain a suit for the possession of the tenure or holding in connection with which the suit is brought. In the first place this section suggests the question whether this is a suit between a landlord and a tenant. The defendants are clearly not tenants within the meaning of section 3, clause 3 of the Bengal Tenancy Act, because they do not hold land under the plaintiff. We may assume, however, for purposes of argument, that the effect of section 193 is to make this a suit between a landlord and tenant. The question, which therefore arises, in the second place, is whether the latter part of

(1) (1870) 13 W. R. 358.

(2) (1874) I. L. R. 1 Bom 588.

section 144, sub-section 1, has any application inasmuch as there is no tenure or holding in connection with which the suit is brought. That sub-section implies that the suit between the landlord and the tenant is one in connection with the tenure or holding held by the tenant under the landlord; if the defendants have no tenure or holding under the plaintiff, because they have no interest in the land on which the trees stand, it would follow that section 144, clause 1 has no application. If this is the correct view of the matter, the forum must be determined by reference to section 17 of the Civil Procedure Code, explanation 3 to which lays down that in suits arising out of contract, the cause of action may be taken to arise at the place where the contract was made. In the case before us, the contract was made at Mymensingh, and the Subordinate Judge of the latter place, would, if this line of reasoning were adopted, have jurisdiction to entertain the suit. This view, however, is not quite in harmony with that indicated by Mr. Justice Banerjee in his judgment in the case of *Shibu Halder v. Gupi Sundari* (1), where that learned Judge held that to a suit for arrears of rent of a fishery, section 144 of the Bengal Tenancy Act is made applicable by virtue of section 193. It is not quite clear from the report, whether the person, who claimed the right of fishery had any interest also in the land covered by water; if he had, it might be concluded that he had a holding or tenure within the meaning of sub-section 1 of section 144. If, however, he had no interest in the land itself and had a several right of fishery, the learned Judge must be taken to have held that section 144 would apply and that by a fiction, as it were, the jurisdiction of the Court in which a suit for arrears of rent of the fishery can be instituted, must be taken to be identical with the jurisdiction of the Court in which a suit might be brought for possession of the fishery. If this analogy which though not free from criticism, is at least plausible, is applied to the case before us, it may be argued that under section 144, the Court, which is competent to try the suit for money payable in respect of the forest-right in question, is the Court in which the suit would lie for recovery of the trees, the right to which was granted by the deed of the 24th of February 1897. If this view is adopted, the plaintiff is met with other difficulties which stand in the way of his application for return of the plaint. Assume for a moment that this is the correct interpretation of section 144 deducible from the decision of this Court in

(1) (1897) I. L. B. 24 Calc. 449.

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the case of *Shibu Haldar v. Gupi Sundari* (1). The question next arises, what is the Court competent to try a suit for possession of the trees. It may be conceded that, although standing timber is movable property within the meaning of section 3 of the Indian Registration Act, yet under section 3, clause 25 and section 4 of the General Clauses Act of 1897, standing timber is immovable property within the meaning of the Civil Procedure Code: *Faimal Singh v. Ladha* (2), *Ram Ghulam v. Manohar Das* (3), *Sabharam v. Vishram* (4), *Madayya v. Yenkata* (5). Assume, therefore, that the growing trees may rightly be regarded as part of the soil and consequently immovable property: [*Hewitt v. Isham* (6)], although it may well be maintained that where under a contract, the grantee has no right to the soil, takes no interest in the land, and obtains a right to the trees with a view to fell them, immediately or within a reasonable time, without any stipulation for the beneficial use of the soil, but with a license to enter and take the trees away, the transfer may be regarded as one of movables, *Smith v. Surman* (7). Even if this assumption is made in favour of the plaintiff, what is the position? He brought the suit upon the allegation in his plaint that the trees were situated within the jurisdiction of the Mymensingh Court. This fact was not controverted by the defendants, no objection was taken on behalf of the latter that the Court had no jurisdiction to try the suit. It was tried in the Court of first instance and a decree was made in favour of the plaintiff. Upon appeal, the defendants for the first time made the suggestion that the trees were within the jurisdiction of the Dacca Court. There was no evidence on the record upon this point, and the defendants relied exclusively upon a recital in the deed of the 24th February, 1897, that the trees were within the district of Dacca. This deed had been executed by the defendants, and they could hardly rely upon the admission made by themselves as conclusive in their favour. The District Judge, therefore, if he thought the matter doubtful, might have applied the principle laid down in section 16 A of the Civil Procedure Code, or he might have directed an enquiry into the question of the situation of the trees as affecting the jurisdiction of the Court. But he has adopted neither course. No doubt, as repeatedly laid down in cases of the highest authority, *Ledgard v. Bull* (8), *Meenakshi v. Subramaniya* (9),

(1) (1897) I. L. R. 24 Calc. 449. (5) (1887) I. L. R. 11 Mad. 193.

(2) (1884) Punj. Rec. 112. (6) (1851) 7 Exch. 77; 86 R. R. 576.

(3) (1887) 7 All. W. N. 59. (7) (1829) 9 B. & C. 561; 33 R. R. 259.

(4) (1894) I. L. R. 19 Bom. 207. (8) (1886) L. R. 13 I. A. 134; I. L. R. 9 All. 191

(9) (1887) L. R. 14 I. A. 160; I. L. R. 11 Mad. 26.

consent of parties cannot confer jurisdiction upon a Court where it has not inherent jurisdiction over the subject matter of the litigation, and the judgment of a Court which lacks this essential jurisdiction, is totally void and this would not be cured by waiver or acquiescence : [See also *Golab Sao v. Chowdhury Madho Lal* (1) *Gurdeo Singh v. Chandrikah Singh* (2)]. Where, however, the defect is not apparent on the face of the proceedings, where specially the question of jurisdiction depends upon a fact, the existence of which is alleged by one of the parties in the Court of first instance and not controverted by the other, it is not obligatory upon a superior Court to enter into the question specially where in order to adjudicate upon the question satisfactorily a further investigation of the facts would be essential: *Marsden v. Wardle* (3) *Furquharson v. Morgan* (4) *Naimudda v. Moncrieff* (5); though, no doubt, if the want of jurisdiction appeared on the face of the pleadings or the admission of the parties or upon the evidence, the question could not only be raised in appeal, for the first time, but it would be the duty of the Court to entertain it [*Achha Mian v. Durga Churn Law* (6)] It must be understood, however, that I do not countenance any encroachment upon the cardinal principle, that when a Court lacks essential jurisdiction, even express consent of the parties cannot confer on the Court the jurisdiction which it does not possess ; no action on the part of the plaintiff, no inaction on the part of the defendant can authorize the Court to determine a matter over which the law has not authorized it to act, or invest its decision with any of the elements of power or of vitality ; consent, waiver, or acquiescence is of no avail in such a case. In the case before us, however, by reason of the allegation of the plaintiff in the Court of first instance, that the trees were within the jurisdiction of the Mymensingh Court and the omission of the defendants to take any exception to it, the result was that, when the point was taken for the first time before the appellate Court, it became at best one upon which there was a reasonable ground for uncertainty. On the one hand was the verified statement of the plaintiff, on the other hand, there was the recital in the deed. Under these circumstances, the Court might very well have proceeded under sub-section 2 of Section 16 A of the Code of Civil Procedure and refused to allow the objection to be taken at the appellate stage : *Shibu Halder v. Gupi Sundari* (7). When the

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(1) (1905) 2 C. L. J. 384.

(4) (1894) 1 Q. B. 552 at 562.

(2) (1907) 5 C. L. J. 611.

(5) (1867) 3 B. L. R. 288.

(3) (1854) 3 E. & B. 695 at 701.

(6) (1897) 1 L. R. 25 Calc. 146.

(7) (1897) 1 L. R. 24 Calc. 449.

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question of jurisdiction is raised before this Court, the position is that facts have not been found upon which we could say that the original Court had no jurisdiction ; upon the record as it stands, we could not possibly make an order for the return of the plaint ; the utmost we could do would be to remand the case for enquiry into this matter. Under these circumstances, and, in view of the fact that the claim is hopelessly barred by limitation, I am not inclined to accede to the invitation of the plaintiff to remand the case for investigation of the location of the trees in order that the question of jurisdiction raised, may possibly be decided in his favour, and the plaint returned to him ; if the case were remanded, there is at least an even chance that the location of the trees may be proved to be within the Mymensingh Court, as alleged in the plaint or the District Judge may treat it as a case to which section 16 A of the Civil Procedure Code applies.

The result, therefore, is that the view taken by the District Judge, that the suit is barred by limitation under Schedule III, article 2 (b) of the Bengal Tenancy Act is correct and the decree of dismissal made by him must be affirmed with costs.

B. M.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

BHOLANATH DUTT AND ANOTHER

v.

HARI MOHAN DUTT.*

CRIMINAL.

1907.

December, 13.

*Criminal Procedure Code (Act V of 1898), Sec. 195—Sanction to prosecute—
Penal Code (Act XLV of 1860), Secs. 196, 211—False case—False evidence.*

Sanction to prosecute under section 211, Indian Penal Code, should only be given where the case is a deliberately false one; where the case brought is not false in substance, but is bolstered up by false evidence, the proper section to give sanction to prosecute under is section 196 of the Indian Penal Code.

Rule obtained by the complainant.

Sanction to prosecute.

Mr. Mahomed-ul-Huq and Babu Manmatha Nath Mukerjee for the Petitioners.

Babus Atulya Charan Bose and Ratan Chand Boral for the Opposite Party.

The facts appear sufficiently from the judgment of the Court which was as follows :—

Rampini J.—This is a Rule calling upon the Chief Presidency Magistrate to show cause why the order of the 2nd. Presidency Magistrate, granting sanction to prosecute the petitioners should not be set aside.

The facts appear to be these. The petitioner No. 1, Bhola Nath Dutt, instituted a case against his brother, charging him with having beaten him on the head with a *pitna*, or beater. The *pitna* bore some red stains; and the petitioner said that these were the stains of the blood which fell from his head. On the matter being referred to the Police Surgeon, Dr. Hayward, he said that the stains were not blood stains. Then the *pitna* was sent to the Chemical Examiner, who said there were no traces of blood on the *pitna*.

Sanction has been given, accordingly, by the second Presidency Magistrate for the prosecution of the petitioner No. 1 under sections 211 and 196, Indian Penal Code, and of the petitioner No. 2 under sections 211, 196 and 109, Indian Penal Code.

We have heard the learned counsel for the petitioners and the learned pleader for the opposite party, and we have also

* Criminal Rule No. 1266 of 1907 against the order of D. Swinhoe, Esq., 2nd Presidency Magistrate of Calcutta, dated the 8th October 1907.

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considered the letter submitted by the 2nd. Presidency Magistrate to this Court.

In that letter the 2nd. Presidency Magistrate says :—* * *
 “In my opinion there was a deliberate attempt on the part of Bhola Nath Dutt to impose upon the Court. Bhola Nath Dutt deposed in Court that the accused Hari Mohan Dutt struck him (Bhola) on the head with a *pitna*, knocking him down and making his head bleed. He produced the *pitna* and stated that the stains on it were caused by the blood that came from his head.” According to the second Presidency Magistrate, the *pitna* bore no signs of blood at all.

In our opinion there is sufficient evidence to justify the prosecution of the petitioner No. 1, Bhola Nath Dutt, under section 196, Indian Penal Code. But we do not consider that there is sufficient evidence to justify his prosecution under section 211, Indian Penal Code, because, it does not appear from the judgment of the Magistrate that the case was a deliberately false one, although it seems *prima facie* to have been bolstered up with false evidence. We, therefore, set aside the sanction to prosecute the petitioner No. 1 under section 211, Indian Penal Code ; but we affirm the sanction to prosecute him under section 196, Indian Penal Code.

The second Presidency Magistrate in his letter says not a word about the petitioner No. 2, Kali Nath Dutt, and the pleader who shows cause against the Rule, is also silent with regard to the petitioner No. 2. Indeed, he has not shown us that there is any ground for sanctioning the prosecution of Kali Nath Dutt under any of the above sections. We accordingly set aside the sanction to prosecute Kali Nath Dutt altogether.

The Rule is made absolute to the extent above mentioned.

N. K. B.

Rule made absolute partly.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

RAJ KUMAR DUTT

v.

TOTHAL SIJO*.

CRIMINAL.

1907.

November, 11.
December, 2.

The Indian Extradition Act (XV of 1903), Sec. 8.—Warrant issued by Political Agent, endorsement in—Jurisdiction of Magistrate to release arrested person on bail, where no such endorsement.

Where a person was arrested upon a warrant issued by a Political Agent under the Indian Extradition Act, and is placed before a Magistrate, and such Magistrate passed an order releasing him on bail and directing him to appear before the Political Agent on a certain date, although there was no endorsement on the warrant, giving the Magistrate power to pass such an order :

Held, that in the absence of such an endorsement under section 8 of the Act, the Magistrate had no authority to pass such an order.

Rule obtained by the arrested person Raj Kumar Dutt.

Babu Atulya Charan Bose in support of the Rule.

Mr. Barton on behalf of the Crown appeared to show cause.

The facts of the case appear sufficiently from the judgment of the High Court which was delivered by

Rampini J.—This is a Rule to show cause why an order of the Chief Presidency Magistrate, admitting to bail the petitioner Raj Kumar Datta who had been arrested under a warrant issued by the Political Resident of Manipore, and directing him to appear before the said Political Resident should not be set aside.

The facts are that there was some correspondence between Messrs. Sanderson & Co., acting on behalf of one Tothal Sijo, and the petitioner's attorney, with regard to certain books of account, which the petitioner was said to have withheld, but which he denied having done. Subsequently, the petitioner was arrested by the Commissioner of Police under a warrant issued by the Political Resident of Manipore, in which it was stated that the petitioner was charged with offences under sections 408 and 417, Penal Code. It is not stated in the warrant, where these offences are said to have been committed, whether in British India or in Manipore.

On being arrested under this warrant, the petitioner was taken before the Chief Presidency Magistrate who admitted him to bail, but directed him to appear before the Political Resident of Manipore. It is complained that this order was illegal, (1)

December, 2.

* Criminal Revision Case No. 1127 of 1907 against the order of Mr. D. H. Kingsford, Chief Presidency Magistrate of Calcutta, dated the 11th September 1907.

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because, the warrant does not show where the offences are alleged to have been committed, and (2), because, the warrant had not been endorsed under section 8, Act XV of 1903, and therefore, the Chief Presidency Magistrate had no authority to pass the order he did.

The Chief Presidency Magistrate states in a letter that he has no cause to show against the Rule. But Mr. Barton, counsel, appears for the Crown and contends that we have no authority over the Political Resident of Manipore, also that the Chief Presidency Magistrate's order was legal.

We have clearly no authority over the Political Resident of Manipore. We do not propose to exercise any authority over him or his proceedings. His warrant for the arrest of the petitioner, though it does not state where the alleged offences were committed, may be legal or otherwise. But we consider that the pleader's second argument must prevail. There was no endorsement on the warrant by the Political Resident, as required by section 8 of the Extradition Act, authorising the Chief Presidency Magistrate to admit the petitioner to bail. The Chief Presidency Magistrate had, therefore, no right to do so, or to direct the petitioner to appear before the Political Resident of Manipore.

We must, therefore, make this Rule absolute and set aside the Chief Presidency Magistrate's order, as prayed which we accordingly do.

M. N. M.

Rule made absolute.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

CHANDRA BHUSAN SEN AND OTHERS

v.

EMPEROR

CRIMINAL.

1907.

November, 27.

[ON THE PROSECUTION OF SITAL SINGH.*]

Criminal Procedure Code (Act V of 1898), section 106—Indian Penal Code (Act XLV of 1860), section 379, 143, conviction under—Recognizance to keep peace, where justifiable.

A conviction under section 143 or under section 379, Indian Penal Code, is not of itself sufficient to sustain an order under section 106, Criminal Procedure Code, unless it is clearly found that there was force employed, or that there were armed men present.

Kishore Sirkar v. K. E. (1), Shoo Bhajan v. Mosawi (2), and Baidya Nath Mazumdar v. Nibaran Chandra Gope (3) followed.

* Criminal Revision Case No. 988 of 1907 against the order of the Sessions Judge of Bhagalpur, dated the 22nd July 1907, affirming on appeal that of the Sub-divisional Magistrate of Beguserai, dated the 29th June 1907.

(1) (1903) 8 C. W. N. 517.

(2) (1900) I. L. R. 27 Calc. 983.

(3) (1908) I. L. R. 30 Calc. 98.

Rule obtained by the accused Chandra Bhusan Sen and others.

Mr. S. P. Sinha and *Babu Atulya Charan Bose* in support of the Rule.

Babus Dasarathi Sanyal and *Suresh Chandra Mukerji* to shew cause.

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The facts appear sufficiently from the judgment of the Court which was delivered by

Rampini J.—This is a Rule calling upon the District Magistrate of Monghyr to show cause why the conviction and sentences under section 379 read with section 114, Indian Penal Code, should not be set aside, or why this Court should not pass such order with reference to the conviction under section 143, Indian Penal Code, as to it may seem fit and proper; and also why the order under section 106, Indian Penal Code, should not be set aside.

The facts of the case are these. The petitioners have been convicted of what may be called the looting of paddy. They are the servants and employees of certain zemindars, who are called the 5 anna zemindars and are co-sharers with the 11 anna zemindars. There has been a great deal of friction and many cases between these zemindars on previous occasions. The accused in the present case have been found to have, on the 19th February last, gone down in a large body of some 100 or 125 men (some with *lathis*) and to have carried off the crop of one Sital Singh.

It appears that he had cut his crop and was watching it, and that the 5 anna zemindars' men came down with labourers, peons and *amlas*, and carried off the crop. They have been convicted under section 379 read with section 114, and under section 143, Indian Penal Code. They have also been bound down to keep the peace, under section 106 of the Code of Criminal Procedure.

The learned counsel for the petitioners contends that his clients should not have been convicted under sections 379 and 114 of the Indian Penal Code, because there was no evidence that any of them actually carried off the paddy with their own hands. In the next place, he contends that as the petitioners have not been convicted of any offence which necessarily implies force and there is no finding that they used force, the order under section 106, Code of Criminal Procedure, is bad.

In support of the first of these contentions, he has cited the

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case of *Hansa Pathak v. Bansi Lal Das*. (1). We think, however, that the present case is distinguishable from that case, because in that case it was found that the accused had not made any preparations for committing theft or for aiding any one in the commission of theft. In the present case, the accused had certainly made preparations for committing theft, or at all events, they aided and abetted the commission of theft. No doubt there were a large number of labourers who carried off the crop. But the *amlahs* went down to see that the theft was committed and they took peons with them for the purpose of seeing that the labourers who carried away the crop were not interfered with in their unlawful acts. Now, in these circumstances, it seems to us that the petitioners were undoubtedly guilty of theft under section 114, Indian Penal Code, and that this case is distinguishable from the case referred to by the learned counsel for the petitioners.

In support of the second plea, Mr. Sinha relies on the case of *Kishore Sircar v. The King Emperor* (2) in which it is said that a conviction under section 143 or under section 379 of the Indian Penal Code is not of itself sufficient to sustain an order under section 106, Code of Criminal Procedure, unless it is clearly found that there was force employed, or that there were armed men present so as to bring the case within the scope of section 106.

We find the same rule laid down in the case of *Sheo Bhojan v. S. A. Mosawi* (3) and in the case of *Baidya Nath Majumdar v. Nibaran Chandra Gope* (4). Now it is admitted in this case that although some of the men who took part in the assembly were armed with *lathis*, there is no clear finding that such was the case. Therefore, it appears to us that, under the terms of these three rulings, the order of the Sub-divisional Magistrate under section 106, Code Criminal Procedure, cannot be sustained.

We see no reason, however, to interfere with the conviction under section 379 and 114, Indian Penal Code, or with the sentences passed on the petitioners. The learned counsel for the petitioners contends that those sentences are too severe. But, in the circumstances of the case, we do not think that this is so. The offence committed was a very serious one. It was calculated to lead to a breach of the peace and even to bloodshed and

(1) (1901) 8 C. W. N. 519.

(3) (1900) I. L. R. 27 Calc. 983.

(2) (1908) 8 C. W. N. 517.

(4) (1903) 1, L. R. 30 Calc. 98.

murder. We, therefore, discharge the Rule as regards the conviction and sentences under sections 379 and 114, Indian Penal Code ; and we direct that the petitioners do now surrender and that they do undergo the remaining portions of the sentences of imprisonment imposed on them.

But we set aside the order under section 106, Code of Criminal Procedure, binding down the petitioners to keep the peace.

M. N. M.

Rule partly made absolute.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

SAITA BISWAL AND OTHERS

v.

DOCHHI STRI.*

Indian Penal Code (Act XLV of 1860), Sec. 448—Criminal Procedure Code (Act V of 1898), Sec. 522—Entry into a house on a bonafide claim not criminal house-trespass—Restoration of articles, not identified, and where no conviction for theft, illegal—Where criminal house trespass is not attended by criminal force, restoration of house to complainant's possession illegal.

Where in the absence of the complainant, certain persons took possession of her house and established there a boy, alleged to be the adopted son of the complainant's father, and the complainant thereafter lodged a complaint of criminal house-trespass and theft, and the Deputy Magistrate convicted the accused of criminal house-trespass, but not of theft, holding that the articles taken away could not be satisfactorily identified, and although the accused claimed the articles as their own, ordered to make over the articles as well as possession of the house to the complainant :

Held—That the case is one, not of criminal but of civil trespass ; that the Deputy Magistrate should not have ordered the articles to be delivered to the complainant : and further that the provisions of Sec. 522, Criminal Procedure Code, do not warrant the passing of an order delivering possession of the house to the complainant because the accused were not convicted of any offence attended by Criminal force.

Rule obtained by the accused Saita Biswal and others.

Babus Dasarathi Sanyal and Tara Prasanna Chatterji in support of the Rule.

No one appeared to shew cause.

The facts appear from the judgment of the High Court which was delivered by

Rampini J.—This is a Rule calling upon the District Magistrate of Puri as also upon the complainant to show cause why the conviction of and sentences passed on the petitioners as well as the order complained of by them should not be set aside.

* Criminal Revision Case No, 968 of 1907 against the order of the Deputy Magistrate of Puri, dated the 21st June 1907.

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The petitioners have been convicted under section 448, Indian Penal Code, and each sentenced to pay a fine of Rs. 50. The Deputy Magistrate has also ordered delivery of possession of the house in dispute as also of certain property recovered to be made over to the complainant.

The facts of the case are these. The complainant is a woman of the name of Dochhi. She went off to Puri on a visit and in her absence, certain persons took possession of the house and established there a boy, alleged to be the adopted son of the father of the complainant. Dochhi complained to the Deputy Magistrate of house-trespass and theft, and the Deputy Magistrate convicted the petitioners of house-trespass and sentenced them as mentioned above. It is clear that the case is one, not of criminal but of civil trespass. The petitioners took possession of the house for the alleged adopted son and are now in possession. The complainant says that certain articles of her property were removed. But the accused have not been convicted of theft. On the contrary the Deputy Magistrate, says, the things carried off are not identifiable, and he has abstained from convicting them of theft. He says the things recovered could not be satisfactorily identified. Notwithstanding this, he has ordered possession to be given to the complainant, although he records in his proceeding that the accused have all claimed the things found in their possession as their own. Now it is extraordinary that the Deputy Magistrate, who says that the things cannot be identified, should have ordered them to be delivered to the complainant. Finally, he has ordered possession of the house to be made over to the complainant. We suppose he has passed the order under section 522, Code of Criminal Procedure. But the provisions of that section do not warrant his doing so, because the petitioners have not been convicted of any offence attended by Criminal force.

We set aside the conviction and sentences and direct that the fines, if paid, be refunded.

The property in possession of the petitioners must be returned to them and possession of the house restored to the persons found in possession of it.

M. N. M.

Rule made absolute.

Before Mr. Justice Rambini and Mr. Justice Sharfuddin.

CHINTAMON SINGH

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Criminal Procedure Code (Act V of 1898), Secs. 110, 192, 529(f), 112, 256, 540—Security, to be of good behaviour—Transfer of case—‘Any case’—Criminal Case—Irregularity—Proceedings to shew cause—Cross-examination after charge—Drawing up charge—Procedure in warrant cases—Witnesses called by Court—Cross-examination by parties—Restrictions to cross-examination—Bad livelihood.

The District Magistrate has jurisdiction to transfer a case under section 110, Criminal Procedure Code, of which he has taken cognizance to any Subordinate Magistrate under section 192, Criminal Procedure Code. The words ‘any case’ in section 192 include a case under section 110, Criminal Procedure Code, and are not limited to ‘criminal cases’ only.

A transfer by a District Magistrate of such a case, even though held to be without jurisdiction would amount to a mere irregularity and cured by section 529 (f).

It is not necessary for a Magistrate to give a list of witnesses in a proceeding drawn up under section 110, Criminal Procedure Code.

Section 256, Criminal Procedure Code, has no application to a case under section 110. Even though by section 117, Criminal Procedure Code, the procedure prescribed for warrant cases is ‘as nearly as possible’ to be followed in cases of security for good behaviour, it does not follow that that gives a right to the accused person to further cross-examine the prosecution witnesses on entering into his defence, when he has once cross-examined them. The reason of the rule in section 256 is that in warrant cases, it is only when the charge is framed that the accused comes to know the definite charge which he is to meet; but in cases of security for good behaviour, he knows what he is to meet as soon as the proceedings are drawn up.

Where witnesses are called by the appellate Court under section 540, Criminal Procedure Code, each party has the right to cross-examine them and the Court has no power to put any restrictions upon such cross-examination.

Rule obtained by the accused.

Proceedings to give security for good behaviour.

The facts and arguments appear from the judgment.

Mr. Hill, Mr. Forbes, Mr. P. L. Roy, Mr. Gregory and Babus Dasarathi Sanyal, Satish Chunder Ghose, Moulvie Mahomed Mustafa Khan and Babu Sarat Kumar Mitra for the Petitioner.

Mr. Eardley Norton for the Crown.

C. A. V.

* Criminal Revision No. 695 of 1907 against the order of F. R. Roe, Esq., Sessions Judge of Hooghly, dated the 20th April 1907 affirming that of C. H. Reid, Esq., Sub-divisional Magistrate of Arariah, Purneah, dated the 12th July 1906.

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The judgment of the Court was delivered by

Rampini J.—This is a Rule to show cause why an order under section 118, Criminal Procedure Code, passed against the petitioner Chintamon Singh, a resident of village Matihari within the jurisdiction of the Forbesgunj Thana of the Arariah Sub-Division of the District of Purneah, should not be set aside.

The order complained of is dated the 10th July 1906 and requires the appellant to execute a bond for Rs. 500 with two sureties for Rs. 500 each, to be of good behaviour for a period of three years. The Sessions Judge has by his order dated the 20th April 1907, affirmed the order of the Sub-Divisional Magistrate. We are now asked to revise these orders on the following grounds :

(1) That the information on which Mr. Lea, the District Magistrate of Purneah, passed an order under section 112, Criminal Procedure Code, does not give the necessary details.

(2) That the enquiry having been begun by Mr. Lea, he had no jurisdiction, after the examination of 109 witnesses, to transfer the case to the file of Mr. Reid, the Sub-Divisional Magistrate of Arariah.

(3) That the trying Magistrate was wrong in not allowing the defence, in accordance with the provisions of section 256, Criminal Procedure Code, to re-call and re-cross-examine the prosecution witnesses.

(4) That the petitioner was not allowed to cross-examine two Police officers, *viz.*, Mr. Macnamara and Babu Ramsaday Mukherjee, who were summoned by the appellate Court under section 540, Criminal Procedure Code, on matters not referred to in their examination-in-chief.

(5) That the trying Magistrate was wrong in restricting the examination-in-chief of the defence witnesses, after 46 witnesses had been examined, to 30 hours' time.

(6) That the trying Magistrate was wrong in refusing to examine about 1,000 witnesses whom the petitioner desired to cite and examine.

(7) That the evidence of repute given by the witnesses for the prosecution is not of a nature to justify the order passed ; and (8) that mere association with a number of supposed bad characters cannot justify an order under section 118, unless the associates are themselves shown to be men of bad character and suspected of committing the dacoities the petitioner is alleged to have instigated.

Other minor points were raised in the course of argument, but they appeared to us to be of no importance.

The petitioner is an employee of Mr. Forbes, an influential landholder of the District of Purneah and holds the position of a "Sirman" or rent collector on the Sultanpur Estate, which Mr. Forbes manages as executor under the will of the late Mr. A. T. Forbes.

The proceedings against the petitioner were initiated as follows :—A report (Ex. F7), dated the 2nd August 1904 was made by a Police officer, Mr. Tucker, to Mr. G. H. Lea, the District Magistrate of Purneah, on receipt of which the latter recorded an order under section 112, Criminal Procedure Code, to the effect that he had received information from the Assistant Superintendent of Police, Arariah, that the petitioner was, by habit, a robber, that he habitually protected and harboured dacoits and habitually committed mischief and extortion and abetted the commission of these offences, and that he was of so desperate and dangerous a character as to render his being at large without security being required of him hazardous to the community. The order accordingly directed him to show cause why he should not be called upon to execute a bond of Rs. 500/- with two sureties of Rs. 500 each for his good behaviour for a period of three years.

The hearing of the case began before the District Magistrate who after the examination-in-chief of a number of witnesses postponed the case, on the application of the petitioner, who had moved this Court for a transfer of his case from the file of that officer. A rule was issued, but it was discharged on the 28th September 1904, and the case was resumed by the District Magistrate on the 10th November. The District Magistrate after the examination-in-chief of 109 prosecution witnesses and the cross-examination of one of them, on the 6th February 1905, transferred the case to the file of Mr. C. H. Reid, Sub-Divisional Magistrate of Arariah.

It was proceeded with regularity by Mr. Reid from the 19th June 1905, till the 12th July 1906.

By the 30th September 1905, the prosecution had examined altogether 52 witnesses. The prosecution then presented a petition stating that it did not desire to examine any more witnesses in consequence of the extreme length of the cross-examination to which the witnesses already examined, had been subjected. The prosecution closed its case on the 15th November

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1905 ; Mr. Forbes, the employer and counsel of the petitioner objected that the Court could not put his client on his defence before he had again cross-examined the witnesses for the prosecution. The Magistrate, Mr. Reid refused to allow the further cross-examination of the prosecution witnesses on the ground that Mr. Forbes's application was made only for the purpose of vexation and delay and to defeat the ends of justice. Mr. Forbes then announced that he intended to apply on the following Monday for an adjournment in order to move the High Court for a transfer of the case. An application to quash the proceedings or in the alternative to transfer the case was subsequently made to this Court and refused on the 5th December 1905.

The examination-in-chief of the defence witnesses commenced on the 7th December, 1905, and in the course of 68 sittings the evidence of 48 witnesses was recorded. On the 2nd February, 1906, the trying Magistrate passed an order limiting the time for the examination-in-chief of further witnesses for the defence, to 30 hours, *i.e.*, to 6 or 7 days more.

The reason for this order was that Mr. Forbes for his client had put in a list of 1760 witnesses, out of which altogether 741 witnesses were examined. It may be mentioned as showing to what an extent the proceedings in this comparatively unimportant case were protracted that the District Magistrate held 9 sittings and the Sub-Divisional Magistrate 228 sittings. There were thus altogether 237 sittings. The record has swollen to most portentous dimensions. The evidence recorded by the Sub-Divisional Magistrate alone covers 6500 foolscap pages. The case proceeded before Mr. Reid for over 14 months and a period of nearly two years elapsed from the beginning of the proceedings till the final order of the Magistrate. The appeal to the Sessions Judge lasted 17 days. Mr. Forbes not only conducted the defence in the Magistrate's Court, but himself gave evidence for the defence, 5 days being occupied in recording his deposition. He appears to have so identified himself with the case of his client that it is impossible to resist the conclusion that he regarded the institution of proceedings against Chintamon Singh as a personal affront to himself and as derogatory to his prestige. This seems to us to account for the great length of these proceedings which were protracted to the extent they have been, only for the purpose of preventing any final order being passed.

We now proceed to discuss the points of law urged by Mr. Hill. The first is as to the want of the necessary materials in the

order of the District Magistrate under section 112, Criminal Procedure Code. We consider that the order of the Magistrate gives all the necessary information required by the section. This section enacts that when a Magistrate acting under section 110, Criminal Procedure Code, deems it necessary to require any person to show cause, he shall make an order in writing, setting forth (1) the substance of the information received, (2) the amount of the bond to be executed, (3) the term for which it is to be in force and (4) the number, character and class of the sureties required. All the above four matters are distinctly stated in the order in question. It has been contended that no list of witnesses is to be found either in the report to the Magistrate or in the order of the Magistrate under section 112, Criminal Procedure Code. The law nowhere requires that any list of witnesses should be so given.

Mr. Hill's second plea impugn's the power of the District Magistrate to transfer the case. Section 192 and 528, Criminal Procedure Code, deal with the powers of a District Magistrate to transfer and withdraw "any case" to and from the file of any Subordinate Magistrate. It is to be observed that the expression used in section 192 clause (1), Criminal Procedure Code, is "any case," and not any "criminal case." It has been contended that section 192, Criminal Procedure Code, applies only to criminal cases, as it is part of a chapter which deals with offences, and the preceding section relates to the cognizance of offences. The words are, however, quite wide enough to include cases under chapter VIII of the Criminal Procedure Code. We may also point out that in the Code of 1872, section 44, which is the section corresponding to section 192 of the present Code, provided only for the transfer of "criminal cases." By the amending Act XI of 1874, the word "criminal" was struck out and it has been omitted from all subsequent enactments. The words "criminal case" are intended to be used in a limited sense and not to apply to every case cognizable by a criminal Court. But when the words "criminal case" have been altered to "any case," it is clear that the Legislature intended that the power of transfer should not be restricted to criminal cases only, and extended the power of transfer to cases of every description. We, therefore, think that the District Magistrate had ample power to transfer this case to the file of Mr. Reid under section 192, Criminal Procedure Code. If the objection with regard to the transfer had any force, even then it could not be regarded as vitiating the whole proceedings; as, the action of the Magistrate in transferring the case could only

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amount to an irregularity which would be covered by the provisions of section 529 clause (f), Criminal Procedure Code (*see Akbar Ali Khan v. Domi Lal* (1)).

Mr. Hill's third plea is as to the right of cross-examination under section 256, Criminal Procedure Code. The claim set up by the defence for a second cross-examination of all the prosecution witnesses appears to us most unreasonable, considering the inordinately lengthy cross-examination of those witnesses before that claim was made. The unreasonably protracted cross-examination of those witnesses relates to so many irrelevant matters that the inference is unavoidable, that as observed by the Sessions Judge, "even if Mr. Forbes was not deliberately manœuvring to drive the Court to fix some time limit, he certainly deliberately omitted to call any important witness in those thirty hours." Apart from the consideration as to whether the application for a second cross-examination of the prosecution witnesses was or was not for the purpose of vexation or delay or to defeat the ends of justice, we consider that section 256, Criminal Procedure Code, has no application to the present case. Section 256 occurs in Chapter XXI of the Code, which relates to the trial of warrant cases. Section 251 of that chapter provides that "the following procedure shall be observed by Magistrates in the trial of warrant cases." Section 252 relates to the evidence for the prosecution, section 253 to the discharge of the accused, section 254 to the framing of the charge, section 255 to the plea of the accused and section 256 to the defence of the accused. No doubt, under section 117, Criminal Procedure Code, the enquiry into bad livelihood cases should be made *as nearly as may be practicable* in the manner prescribed for conducting trials and recording evidence in warrant cases. But we do not think that the provisions of section 256, Criminal Procedure Code, indicate that the person called upon to show cause under section 110, Criminal Procedure Code, has a right to further cross-examine the prosecution witnesses under section 256 Criminal Procedure Code, inasmuch as the provisions of this section relate to cases where a formal charge, as required by section 254, has been drawn up and the accused has been called upon to meet that charge. In cases under section 110, Criminal Procedure Code, the order of the Magistrate under section 112, Criminal Procedure Code, is equivalent to a charge. The object in giving the substance of the information in an order under

(1) (1900) 4 C. W. N. 821.

section 112, Criminal Procedure Code, is that the person called upon to show cause may clearly understand the matter that he has to meet in his defence, and a Magistrate has no power to go beyond the requirements of his order under section 112, Criminal Procedure Code. In warrant cases a charge sheet is prepared for similar purposes. In the above view, the cross-examination of witnesses in a proceeding under section 110, Criminal Procedure Code, is tantamount to their cross-examination after charge. It cannot be contended that in the present instance the appellant had no information as to the matters which he would be required to meet. In trials of warrant cases, it is when a charge sheet is drawn up that the accused is for the first time informed as to the offences that have appeared from the evidence against him to have been committed by him, and, hence, it is only right that the accused should in warrant cases be given an opportunity to cross-examine the prosecution witnesses after a charge has been framed. In summons cases the accused is informed in the summons as to the charges against him and hence the Legislature does not require the preparation of any formal charge, as in warrant cases, nor any second cross-examination. For the above reasons we think that the petitioner had no right to any further cross-examination, especially when the prosecution witnesses had already been cross-examined to a very unreasonable length.

The petitioner's fourth plea relates to the limits put on the cross-examination of Mr. Macnamara and Babu Ram Saday Mukherjee in the Sessions Court. These witnesses were summoned by the appellate Court under section 540, Criminal Procedure Code, as court witnesses, and as such, both parties were equally entitled to a full cross-examination of these witnesses on matters relevant to the enquiry. From the record of their evidence we find that both parties were allowed to cross-examination. In the recorded evidence of Babu Ram Saday Mukherjee, we find the following note near the end of the cross-examination by Mr. Norton for the Crown :—"The cross-examination is to be confined to the subjects on which I examined the witness." There is no such note in the cross-examination of this witness by Mr. Gregory, counsel for the defence. The above order of the Sessions Judge may have reference to the whole cross-examination of that witness. But no such restriction appears to have been made with reference to the cross-examination of Mr. Macnamara. At all events there is no such note by the Sessions Judge as we find in the cross-examination of the other

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witness. We have already observed that such restriction is not allowed by law. It is urged that the appellant has been prejudiced by this restriction. But in the first place, it was the cross-examination by the counsel for the prosecution that appears to have been restricted. In the second place, the evidence of Mr. Macnamara and Babu Ram Saday Mukherjee relates only to the manner in which the evidence of repute was collected, and what they say cannot be treated as any evidence of bad repute. If their evidence were eliminated from the record, there would still remain abundance of evidence as to the reputed character of the appellant.

The fifth and sixth objections are as to the trying Magistrate having restricted the examination-in-chief of a number of defence witnesses to a limit of 30 hours and to his not allowing the whole 1760 witnesses named for the defence to be called. The demand to examine 1760 witnesses for the defence is in our opinion preposterous. But the trying Magistrate did not reject this demand until it was obvious that an attempt was being made to protract the examination of the defence witnesses to a most unnecessary extent so as to delay, if not to prevent the final termination of the proceedings. Under these circumstances the trying Magistrate was not unreasonable in fixing some limit of time within which the defence should close its case. We find that in spite of this apparently small limit of time for the examination of the defence witnesses, it was ample; for we observe that seven hundred witnesses were examined-in-chief during those thirty hours (*i.e.* 6 or 7 days time) allowed. But it cannot be fairly said we think that the defence has been prejudiced by the fact that they were not able to examine all the 1760 witnesses they had summoned. It is the quality and not the quantity of evidence that goes to establish a point. Under the circumstances, the petitioner has no reason to complain because he was not allowed to examine more witnesses. It is also made a grievance that Mr. Forbes was called on to sum up his client's case in one hour's time. But this was after he had been arguing for 15 days.

The seventh objection is that the evidence of repute is not sufficient to justify the order. It appears that out of the witnesses examined for the prosecution, the lower appellate Court has believed the evidence of 40 witnesses who prove the association of the petitioner with bad characters at various times, especially in most cases immediately before the occurrence of a dacoity.

There had been a series of dacoities in the month of July, 1902

and in consequence of this Babu Ram Saday Mukerjee was deputed to the Araria Sub-division to trace out the dacoits, as the Local Police had been unable to detect them. Mr. Tucker was at that time Superintendent of Police, Purnea, and he sent Babu Ram Saday Mukerjee, an Inspector of Police of the Detective Department to Mr. Duff, manager of the Sultanpur Estate, for assistance in the enquiries that Babu Ram Saday was going to set on foot. Mr. Duff deputed the petitioner Chintamon Singh and another man, Janak Lal Missir to give the required assistance to Babu Ram Saday Mukerjee. The first result of these enquiries appears to have been the discovery of a gang known as the Barfi Singh gang. On the 5th. February, 1903, Inspector Sital Prosad drew up a first information report, naming about 150 persons as members of the above gang. The names of the petitioner Chintamon Singh and of Janak Lal Missir appear among the names of the accused in the first information report. But a case was instituted against only 23, for want of sufficient evidence against the rest. During the progress of this enquiry, two other dacoities took place, one at Pathardeva and the other at Balahi. These two were immediately followed by a third dacoity at Sonapur, in which one man was killed and another very seriously wounded. In 1903, there were no less than 19 dacoities, and the present petitioner is alleged to have been connected with them.

The petitioner, owing to his position as Sirman of a rich estate and the protégé of an influential zemindar like Mr. Forbes, who is also, a Barrister-at-Law, appears to have been dreaded by the villagers and they were naturally afraid to publicly denounce him as one of the instigators of those dacoities. Had it not been for the arrival of Ram Saday Mukerjee and his energetic enquiries, no trace would have been obtained of the dacoits. The energy with which these enquiries were conducted and the presence of European Police Officers anxious to discover the dacoits evidently emboldened the villagers to open their mouths. Mr. Macnamara, apparently not blindly trusting his subordinates in the enquiry into the present case, seems to have made up his mind to hear with his own ears what Chintamon Singh's reputation was in the vicinity of Forbesgunj. Mr. Macnamara was engaged for three days in making those enquiries. The common people appear to have refused to give evidence unless the headmen gave evidence also. And on the 24th. July, 1904, Mr. Macnamara examined the headmen of Sonapur, Mirgunj and other villages. The statements

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made by the villagers and headmen to Mr. Macnamara disclosed the fact that Chintamon Singh was the leader of the dacoits.

By the evidence of 40 witnesses it is proved beyond all possible doubt that about the end of July 1904, Chintamon Singh had the reputation of being a leader of dacoits. This reputation prevailed amongst the people in whose villages the dacoities had taken place. Under section 117, clause (3), Criminal Procedure Code, the fact, that a person is a habitual offender, may be proved by evidence of general repute. In dealing with cases under Chapter VIII of the Criminal Procedure Code, Magistrates ought, especially where no conviction is proved, (as in the present case), to take great care to test the evidence for the prosecution. We find that the two lower courts in their careful and elaborate judgments have concurrently found that the evidence of general repute in the present case has satisfactorily proved that Chintamon Singh is a habitual offender. In cases like the present there should appear clear evidence that the party called upon to show cause is known to have associated with criminals; to have frequently been seen near the places where thefts and other offences have been committed, and that, immediately after his being found associated with criminals, thefts, etc. have taken place. There is abundance of evidence on the record to show that the associates of the petitioner are criminals, that he has been seen near places where dacoities took place and that immediately after or almost immediately after his meeting with his associates, these dacoities occurred.

Our attention has been drawn to the case of *Rai Isri Pershad v. Queen Empress* (1) and it has been contended that in accordance with this Court's ruling in that case, a man's general reputation is that which he bears amongst all the townsmen in the place in which he lives, and that if the state of things is that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character. In that case acts of extortion were said to have been committed in the neighbourhood of the place where Isri Pershad resided. It was, therefore, necessary that there should have been reliable evidence of bad repute given by the people amidst whom he lived. In the present case, the evidence of general reputation comes from people of villages where the dacoities had taken place, and in such a case, this evidence is certainly to be treated as evidence of

(1) (1895) I. L. R. 28 Calc. 621.

general repute as required by section 117, Criminal Procedure Code.

It is of no avail to say that the villagers who have been examined in this case did not volunteer their evidence and that they were silent for such a length of time. In all bad livelihood cases where the accused is either himself a person of influence or is under the protection of such a person, no villager would dare to mention the name of such a man for the fear of bringing retribution down on his own head.

The petitioner's eighth plea is that his associates have not been proved to have been bad characters themselves, or to have been suspected of being connected with the dacoities of 1903. But that is not so. It appears from the evidence that there are at least 20 associates of the petitioner who had been convicted before the proceedings were drawn up against him. These convictions had taken place during the period of association. Some of these associates had been convicted once, some twice, some thrice and some four times. These convictions have been either under section 110, Criminal Procedure Code, or for dacoity and theft. In one instance, one of his associates, named Dadla Dosadh, was hanged and six others transported for life, two have been sentenced to ten years' imprisonment and the rest for smaller terms. A man who associates with criminals of this class can hardly be regarded as a man of good character.

It is contended that there is no evidence on the record to show that the associates of the petitioner had ever been suspected of any of the dacoities. But this is not so, as it appears from the evidence of the prosecution witnesses Makund Lal, Doman, Talak Chand Sahu, Achoy Lal Bhagat, Kusdas and others that Chintamon's associates and he himself were always suspected of being concerned in the dacoities.

We may add that the petitioner's first two pleas relate to preliminary matters. They should have been taken before Mr. Lea and Mr. Reid. It appears from the judgment of Mr. Lea that he had afforded the defence before the commencement of the case facilities for putting forward any legal point. Then, in his motion to the High Court on the 5th. December, 1905, the petitioner had a further opportunity of pressing these objections. In his first motion to the High Court in September, 1904, the first objection raised here was not urged at all. In his motion to the High Court in December, 1905, these objections were urged, but this court declined to interfere. It is futile now to set up

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these objections after the petitioner failed to urge them or urged them unsuccessfully in the preliminary stages of the proceedings.

We have been asked to go into the merits of the case in detail, but the concurrent findings of facts by both the Courts below render it unnecessary for us to consider the evidence at greater length than we have done. We have heard the comments made by counsel on both sides on the evidence, and we consider that the lower appellate Court was right in excluding the evidence of some of the witnesses for the prosecution as untrustworthy and acting on the evidence of others. We, in no way, differ from his views on this subject.

For the above reasons, we decline to interfere with the order of the Magistrate complained of in this case, and discharge the Rule.

N. K. B.

Rule discharged.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

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v.

THE EMPEROR

ON THE PROSECUTION OF NABABDI.

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Criminal Procedure Code (Act V of 1898), Sec. 133—Nuisance, removal of—Conditional order—Claim of right to land—Bona fide of the claim, finding of—Limitation of claim—Magistrate, power of, to go into question of civil right—Jurisdiction.

A Magistrate, in a proceeding under section 133 of the Code of Criminal Procedure, is not competent to decide the question as to whether the claim, set up by a person against whom a conditional order is made under the section, to the land in question is barred by limitation. He can only decide whether the claim is a *bona fide* one and in the event of his not holding that the claim is not a *bona fide* one, he should refrain from exercising jurisdiction.

Rule obtained by the Defendant-petitioner.

Proceeding under section 133 of the Code of Criminal Procedure.

The facts of the case appear from the judgment of the lower Court which is as follows :

This is an application under section 133, Criminal Procedure Code, for restraining the defendants from cultivating and obstructing with forces certain land known as Dwalkuri which is

* Criminal Revision No. 1264 of 1907, against an order of O. H. Mosely, Esq., Sub-Divisional Magistrate of Habigunge, dated the 10th. September, 1907, upheld by the order of J. Phillimore, Esq., Sessions Judge of Sylhet, dated the 13th. November 1907.

alleged to be commonly used by the villagers as a place for the burning and burial of dead. Defendants Kamini Kumar Biswas and Raman Biswas claim proprietary rights over the land. They have filed documents purporting to show that out of 2 taluks within which the land is admittedly situated, they own the whole of one and half of the other. I understand that the first party alleges that some of the land appertains to other taluks also, I have not however, gone into this question nor into the question whether the defendants are entitled to cultivate the lands appertaining to the taluk of which they own only a half share. Good evidence has been adduced before me by the first party, proving that the land has from time immemorial been used for the purpose of burying and burning dead. It is admitted by the defendants that the land has been waste until quite recently. It is, therefore, a ground left unoccupied for sanitary purposes and a public place within the meaning of section 133, Criminal Procedure Code. The fact that it is not the only such ground appertaining to the village, does not, I think, matter. Relying on the opinion of the Honourable Judges of the High Court recorded on page 466 of Indian Law Reports XV Calcutta, I do not also, think that it matters that it is the alleged rights of the villagers and not of the general public which are at stake. Defendants urge that as they have set up a *bond fide* claim of title to the land, this Court has no jurisdiction to proceed under section 133, Criminal Procedure Code. I am a little bit doubtful whether their claim so far as it may be *bond fide* extends to the whole of the land in question, but I do not wish to emphasise this doubt now. I only record my opinion that, in view of the proved facts of immemorial usage of the land by the villagers for sanitary purposes, the defendant's claim is, as far as I can judge, barred by limitation; a claim which is barred by limitation may yet, I suppose, possibly be regarded as *bond fide*. I cannot, however, think that it can be regarded by any Court as well founded. Relying, therefore, on the last part of the ruling cited on p. 573, Indian Law Reports XV Calcutta, I suspend this proceeding for one month from to day to allow the defendants an opportunity of establishing their claims in the Civil Court.

Babu Dasarathi Sanyal for the Petitioner.

Babus Sharat Chandra Roy Chowdhury and Gobinda Chandra Dey Roy for the Opposite party.

The judgment of the Court was delivered by

Rampini J.—This is a Rule, calling upon the District

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Magistrate of Sylhet to show cause why the order of the Sub-Divisional Magistrate of Habiganj, dated the 10th. September last, making absolute his order, under section 133, Code of Criminal Procedure, should not be set aside, on the grounds, (1) that section 133, Criminal Procedure Code, does not apply to burial or burning grounds, and (2) that the Sub-Divisional Magistrate has not decided the question of *bona fides* raised by the petitioner.

It is unnecessary for us to enter into the first of these grounds.

As regards the second ground, we think that the learned Sub-Divisional Magistrate has not come to a proper finding as to the question of *bona fides*. It is clear to us that, as admitted by the Sub-Divisional Magistrate, the petitioner raised a claim of right to the land. He said he had a proprietary right in it; and the Sub-Divisional Magistrate has come to the conclusion that if he has any right it is barred by limitation, so far as he is able to judge. And he adds: "A claim, which is barred by limitation, may yet, I suppose possibly be regarded as *bona fide*. I cannot, however, think that it can be regarded by any Court as well-founded."

We find it difficult to understand the meaning of the above two sentences. It appears to us that if the petitioner has a claim to the land (and he seems to have one) there is no reason to suppose that it is not a *bona fide* one. We cannot tell whether it is barred by limitation or not; and the Sub-Divisional Magistrate was not, we think, competent to decide this question and has not decided it to our satisfaction. We do not feel certain, from the observations made by the Magistrate, that the petitioner's claim is barred; and we, therefore, do not see why he should not have a *bona fide* claim to the land. In these circumstances, the Sub-Divisional Magistrate should have refrained from exercising jurisdiction.

We, therefore, make the Rule absolute and set aside the order complained of.

B. M.

Rule made absolute.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice
and Mr. Justice Holmwood.

ARSALI SADAGAR

v.

RAM SATYA BHAKAT.*

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August, 22.

*Bengal Rent Recovery Act (VIII of 1885, B. C.), Sec. 16—Sale—Purchase—
Encumbrances, avoidance of—Estoppel—Plaint—New case—Notice to quit—
Maintainability of suit.*

Where a purchaser of a tenure in a sale held under the provisions of Act VIII of 1885 B. C. sued the person in possession for rent, and obtained an *ex-parte* decree, and then brought a suit for enhancement of rent to which the defendant pleaded that he was entitled to hold the land under a *mokarari potta* upon which the plaintiff withdrew his suit and brought the present suit for ejectment :

Held, the plaintiff was not estopped from bringing the suit by reason of his having brought a rent suit against the defendant. Under section 16 of the Act, he is allowed to avoid encumbrances, and if the defendant would not accept the position of tenant offered him and pay a reasonable rent, the plaintiff is entitled to eject him.

No previous notice to quit need be given for the maintainability of a suit of this nature.

Gobind Chunder Bose v. Alimooddeen (1) explained.

Titu Bibi v. Mohesh Chunder Bagchi (2) followed.

Suit for ejectment.

Appeal by the Plaintiff under Sec. 15 of the Letters Patent.

The judgment appealed against was as follows :

Geidt J.—The plaintiff in the suit out of which this appeal arises purchased at a sale held in execution of a decree a *murali jamai* right held by one Gour Singh. This was in 1896. Finding the defendant on the land he brought a suit against him for rent and obtained an *ex-parte* decree. Subsequently, he brought another suit for enhancement of rent and in this second suit, the defendant set up a *mokarari* right. The plaintiff then withdrew that suit for enhancement of rent and brings this suit to eject the defendant after giving him notice to quit, on the ground

* Appeal under Sec. 15 of the Letters Patent against the decision of Mr. Justice Geidt in S. A. No. 454 of 1905, affirming a decree of Babu Mohim Chander Sarkar, Subordinate Judge, Manbhum, dated the 17th. December 1904, reversing that of Babu Soohi Bhusan Sen, Munsiff, Purulia, dated the 11th. August 1904.

(1) (1868) 11 W. R. 160.

(2) (1883) I. L. R. 9 Calc. 683.

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that the mokarari right had been extinguished by his purchase, the case being one governed by section 16 of Bengal Act VIII of 1865.

The Munsiff gave the plaintiff a decree, but the Subordinate Judge has held that the plaintiff is estopped from saying that the defendant is a trespasser and has dismissed the suit on the ground that the plaintiff has not proved that he served the defendant with notice to quit. I do not understand how the question of estoppel arises in this case, but as the Subordinate Judge has found that no notice was served on the defendant, his decree is supported on the ground that the plaintiff had by bringing the two rent-suits, recognised the defendant as a tenant.

The appellant urges that the institution of the suits was a mistake ; but I do not understand that even conceding that the plaintiff was ignorant of the defendant's status, that makes any difference. He sued him as a tenant and thereby recognised him to be a tenant. But I fail to understand on the pleadings how it can be contended that when the plaintiff brought his rent suit he was under a mistake as to the defendant's rights. As far as I understand the matter, his case is even now that when he brought the rent suits, the defendant was an ordinary tenant ; and there is nothing on the record to show that the plaintiff had made any mistake in that respect even on the plaintiff's own allegations. His case is that the defendant's mokarari right, if he had any, became extinct by operation of law, when the plaintiff purchased the tenure. But though the plaintiff became entitled to avoid the mokarari, that would not convert the defendant into a trespasser.

The result, therefore, is that the decree of the Subordinate Judge is upheld though not on the grounds stated by him, and this appeal dismissed with costs.

From this judgment the present appeal was preferred under section 15 of the Letters Patent.

Babu Dwarka Nath Mitter for the Appellant.

Babu Kshetra Mohan Sen (for *Babu Digambar Chatterji*) for the Respondent.

August, 22.

The following judgments were delivered :

Maclean C. J.—Had it not been for the view expressed by my learned brother, Mr. Justice Geidt, I should have thought that this was a reasonably simple case. The plaintiff purchased a certain tenure in a sale held under the provisions of Act VIII of 1865, B. C. Under Sec. 16 of that Act, he acquires it free from all encumbrances, subject to the provisions of that section. After he had

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made his purchase he found the defendant, the present respondent, to be in possession, and sued him for rent, and obtained an *ex parte* decree against him. He then sued him for enhancement of rent ; and, then for the first time the defendant set up that he was entitled to hold the property under a *mokararee pottah* dated the 19th of Jaistha 1273. The plaintiff then withdrew that suit and brought the present suit which in effect, I think, we ought to treat as a suit to avoid an encumbrance, on the ground that if the defendant had a *mokararee pottah* it was at any rate voidable at the instance of the plaintiff, under the provisions of the section to which I have referred. The plaintiff's case in effect was that he knew nothing about this *mokararee pottah* until it was set up in the enhancement suit, and his contention is that even if this be such a pottah, he is entitled to avoid it under the provisions of the Act. In that state of circumstances, the case came before the Munsiff, who went into the question of the right of the plaintiff to avoid the *mokararee pottah*, and held that he was entitled to do so and to *khas* possession. It was rather a hyper-critical criticism of the plaint to say that the plaintiff does not in so many words seek to avoid the *mokararee pottah* but that he treats it as void. We must look at the effect of the plaint as a whole, in which the plaintiff asks for *khas* possession ; and I think we are perfectly justified on looking at it to say that the suit is practically one to avoid the *mokararee pottah*.

The Subordinate Judge reversed the Munsiff's judgment on the ground that inasmuch as the plaintiff had previously brought a rent-suit, and had treated the defendant as his tenant, he was estopped from bringing the present suit. That reasoning, however, does not seem to have commended itself to Mr. Justice Geidt : Nor can I accept it. The plaintiff knew nothing of the claim of the defendant under the alleged *mokararee pottah*. He only said 'I am willing to treat you as a tenant, if you pay me a reasonable rent.' The defendant did not accept that position but said 'It is true I am a tenant, but I am a tenant under the *mokararee pottah*,' to which the plaintiff replies, "If you are such a tenant, I am entitled to avoid such a tenancy." I see no case of estoppel against the plaintiff. The defendant would not accept the position which the plaintiff offered him, to be allowed to continue as a tenant by paying a reasonable rent.

Then it is suggested that the present action is not maintainable, because there was no previous notice given to the defendant

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to quit ; and reliance is placed upon the decision of a Division Bench of this Court in the case of *Gobind Chunder Bose v. Alimooddeen* (1) in which it is said it was decided that a previous notice of the auction purchaser's intention to cancel the under-tenure has to be given before a suit can be brought. But we find that the learned Judges did not decide any thing of the sort : what they say is "It does not follow that, without any act on the part of the auction purchaser, or any notice of an intention to cancel a pre-existing *miras* tenure, an auction-purchaser might avoid any incumbrance." That is something very different. But here we have an act on the part of the auction-purchaser, showing his intention to avoid the incumbrance, *viz.*, the suit itself. In the Full Bench case of *Titu Bibi v. Mohesh Chunder Bagchi* (2), it was distinctly held that previous notice was not necessary ; I agree in that view. It has not been suggested what sort of notice is requisite, whether statutory or otherwise.

In these circumstances, I think the proper course is to reverse the judgments of Mr. Justice Geidt and of the Subordinate Judge and to send the case back to the Subordinate Judge for him to decide whether the plaintiff is entitled, having regard to the circumstances of the case, to avoid the under-tenure. I have said that that subject was dealt with by the Munsiff and it ought to have been dealt with by the Subordinate Judge. If by reason of the view taken by the Subordinate Judge, there are any other issues raised before the Munsiff which were not dealt with by the Subordinate Judge he may deal with them on the remand.

The appellant will have the costs of this appeal and of the appeal before Mr. Justice Geidt.

Holmwood J.—I agree.

N. K. B.

Appeal allowed ; case remanded.

(1) (1868) 11 W. R. 160.

(2) (1883) I. L. R. 9 Calc. 683.

Before Mr. Justice Rampini and Mr. Justice Caspersz.

BHAGAWAT N. CHOWDHURY AND OTHERS.

v.

SUBA LAL JHA.

Hindu Law—Mitakshara—Joint Hindu family—Mortgage, suit to enforce—Liability of members, personal or otherwise—Signature as witness, if creates liability—Limitation.

A mortgage bond was executed by two brothers, members of a joint Hindu family governed by the Mitakshara Law. On the death of one of the brothers, a suit was brought, more than six years after the due date of the bond, to enforce the bond against the property of all the members of the joint family including the mortgagor who was alive, the sons and grandsons of the deceased mortgagor and the son of the surviving mortgagor :

Held, that the mortgagee is entitled only to a mortgage decree against the mortgagor who is alive, that he has a right only to a personal decree against the other defendants and that the suit, brought more than six years after the due date of the bond, is barred by limitation as against these defendants other than the mortgagor.

Swija Prasad v. Golab Chand (1) followed.

Badri Prasad v. Madan Lal (2) dissented from.

The fact that a son of the deceased mortgagor signed the mortgage bond as a witness does not render him liable as if he were one of the mortgagors.

Suit to enforce a mortgage-bond against the property of all the members of a joint Hindu family governed by the Mitakshara Law.

Appeal by the Defendants.

The facts of the case material to this report appear from the judgment.

Dr. Rash Behary Ghose, and *Babus Shoroshi Charan Mitra* and *Kulwant Sahay* for the Appellants.

Babus Golap Chandra Sarkar, *Saligram Singh* and *Lachmi Narayan Singh* for the Respondent.

The following judgment was delivered by

Rampini J.—The suit out of which this appeal arises was brought upon a mortgage-bond executed by two brothers, members of a joint Hindu family governed by the Mitakshara law. One of the mortgagors is now dead. The other, Bhagwat Narain Chowdhury, is the defendant No. 1. The sons and grandsons of the deceased mortgagor and the son of the defen-

* Appeal from Appellate Decree No. 1078 of 1903 against a decree of Babu Shyam Chand Roy, Subordinate Judge of Tirhoot dated the 20th February 1903 affirming that of Babu Hem Chandra Mukherjee, Munsiff of Durbhanga, dated the 31st May 1902.

(1) (1900) I. L. R. 27. Calc. 762.

(2) (1898) I. L. R. 15 All. 75.

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Rampini, J.

dant No. 1 have all been made parties defendant. The object of the suit is to enforce the bond against the property of all the members of the joint family.

The Subordinate Judge held that there was no legal necessity for the debt, and that it was not an antecedent debt, but that it was a debt which was neither immoral nor illegal and which, therefore, it was the pious duty of the sons and grandsons of the mortgagors to discharge. He accordingly gave the plaintiff a mortgage decree against all the defendants.

The defendants appeal. On their behalf it has been contended, on the authority of the decision of this Court in *Surja Prasad v. Golab Chand* (1), that the plaintiff is entitled only to a mortgage-decree against the defendant No. 1, that he has a right only to a personal decree against the other defendants, and that, as the suit is admittedly brought more than six years after the due date of the bond, the suit, as against the defendants other than the defendant No. 1, is barred by limitation.

It appears to us that such is the effect of the decision of this Court relied on by the appellant. The Subordinate Judge distinguishes it because in the present case one of the mortgagors is alive, and because, the decision is not in accordance with that of the Allahabad High Court, in *Badri Prasad v. Madan Lal* (2). It must be admitted that the Subordinate Judge is right on this latter point, but we must of course follow the ruling of this Court, unless we see reason to dissent from it which we are not prepared to do. The fact that one of the mortgagors is alive would seem to make no difference and not to distinguish this case from that of *Surja Prasad v. Golab Chand* (1). The only difference it would seem to make is that, in this case, the plaintiff can obtain a mortgage-decree against the mortgagor who is alive.

We may note that the defendant No. 2, who is the son of the deceased mortgagor Sheo Narain, signed the bond as a witness, but this would not seem to render him liable as if he were one of the mortgagors.

We, therefore, modify the decree of the lower Court. We set aside his decree against all the defendants except the defendant No. 1. We affirm his decree against the defendant No. 1. This order carries costs in proportion.

B. M.

Appeal allowed.

(1) (1900) I. L. R. 27 Calc. 762.

(2) (1893) I. L. R. 15 All. 75.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

IJJATULLA BHUYAN

v.

CHANDRA MOHAN BANERJEE.*

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December, 2, 3, 11.

Mesne-profits—Assessment, principle of—Jote and Khamar lands—Decree-holder not a cultivator—Deductions to be made in case of khamar lands—Interest, rate of—Civil Procedure Code (Act XIV of 1882), Sec. 211.

In the assessment of mesne-profits, two different principles are adopted, one applicable to the case of the rent-paying lands or *jote* lands, and the other applicable to the *khamar* lands.

The decree-holder, though not himself a cultivator is to be regarded as the potential, and therefore the actual cultivator of the specific plots which were cultivated by the judgment-debtors from whom he succeeded in obtaining possession. The occupation of *khamar* lands in the direct cultivation of the *maliks* very nearly approximates to the occupation of *raiya* lands held by ordinary cultivators.

Roghu Nandan v. Jalpa (1), *Surja Pershad v. L. D. Reid* (2) and *Laljee Shahay v. F. C. Walker* (3) referred to.

The deduction to be made from the value of the produce of the *khamar* lands on account of the risk and supervision of the cultivation carried on by persons in the position of the decree-holder in addition to the ordinary costs of cultivation, may be calculated at half the usual rate on account of collection charges allowed in the case of rent-paying or *jote* lands. Five per cent. on the value of the actual produce of the *khamar* lands is a sufficient allowance to meet the costs of supervision and any other incidental charges.

A claim for mesne-profits includes interest on such mesne-profits. Interest as forming a part of the mesne-profits or damages cannot be allowed for any period subsequent to that limited by section 211 of the Civil Procedure Code, and in the exercise of a proper discretion, the higher rate of 12 per cent., should continue till the obtaining of possession by the decree-holder and thereafter at the usual Court rate.

Giris Chunder Lahiri v. Soshi Sekharieswar Roy (4) referred to.

Appeal by the judgment-debtor.

Application for ascertainment of mesne profits.

Dr. Rash Behary Ghose and Babus Dwarka Nath Chuckerbutty, Joy Gopal Ghosha, Gobind Chunder Dey Roy and Mohini Mohun Chatterjee for the Appellant.

Babus Tara Kishore Chowdhury, Chandra Kant Ghose, Bidhu Bhusan Gangooly and Nagendra Nath Mitter for the Respondent.

C. A. V.

* Appeal from Order No. 492 of 1905, against the order of Babu Ananda Nath Mazumdar, Subordinate Judge, first Court, Mymensingh, dated the 8th August 1905.

(1) (1897) 3 C. W. N. 748.

(2) (1902) I. L. R. 29 Calc. 622.

(3) (1902) 6 C. W. N. 732.

(4) (1900) I. L. R. 27 Calc. 951; L. R. 27 I. A. 110.

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December, 11.

The facts of the case appear sufficiently from the judgment.
The judgment of the Court was delivered by

Caspersz J.—This appeal arises out of an application by the decree-holder respondent for the judicial ascertainment of mesne profits of certain lands for the period extending from 29th March 1893, up to 27th or 28th December 1899, being the date of delivery of possession. The decree-holder obtained a decree for 5 annas 5 gundas share of a certain revenue paying taluq. It was not determined what the boundaries of the taluq were, but it was held that a purchaser in the position of the plaintiff was not bound to recognise any previous partition not made by the Collector. The plaintiff, therefore, obtained a decree for an undivided share, together with mesne profits, and the defendant's alleged *sikmi* taluq was set aside. The decree of the first Court was affirmed on appeal by the High Court on the 20th June 1899. Proceedings in execution were taken in due course, and, on the 21st April 1903, a Division Bench of this Court (Rampini and Handley JJ.) interpreted the decree, so as to secure to the decree-holder possession of certain specific plots of land as appurtenant to the share of 5 annas 5 gundas decreed to him. We cannot, in any way, discuss or vary the interpretation so arrived at. In the assessment of mesne profits, two different principles must be adopted, one applicable to the case of the rent-paying lands, or *jote* lands, and the other applicable to the case of the specific plots which we have mentioned and which we may call the *khamar* lands.

A Civil Court Amin was deputed to make the necessary local enquiries. His report is before us, and we have, also, referred to the *Ekival*, or abstract, prepared by him. The Civil Court Amin found that the total amount of mesne profits, including the rents of the *jote* lands and the price of the produce of the *khamar* lands, came up to Rs. 16304-8 annas 0 pies 13½ krants. From this sum he deducted on account of expenditure, that is to say, collection charges at 10 per cent and the costs of cultivation, Rs. 5358-6-5-13½, the resultant amount of mesne profits being Rs. 10946-1-7. These conclusions have been accepted by the learned Subordinate Judge in his order from which the present appeal has been preferred. But the decree of the learned Subordinate Judge brings up the amount of mesne profits to Rs. 22335-7-7-11 which figure has been calculated so as to include interest at 12 per cent. on the various sums accruing for the successive years from 29th March 1893 to 7th August 1905,

the latter date being the day preceding the day on which the decree was made.

The judgment-debtors have appealed against the decree awarding mesne profits for the amount we have mentioned, and the contentions before us are four in number ; *first*, as to the true principle of assessment to be adopted ; *secondly*, as to the apportionment of the total sum between the several judgment-debtors ; *thirdly*, as to the deductions that should be made from the value of the produce of the *khamar* lands on account of the risk and supervision of the cultivation carried on by persons in the position of the decree-holder ; and, *fourthly*, as to the rate of interest at 12 per cent, allowed by the learned Subordinate Judge.

With regard to the first contention, we observe that the only difficulty that arises is in respect of the *khamar* lands. The contention, as we understand it, is that the decree-holder, not being himself a cultivator, should not be allowed mesne profits calculated on the price of the actual produce.

Our attention has been called to the cases of *Surja Pershad Narain Singh v. Reid* (1) and *Laljee Shahay Singh v. Walker* (2), and it has been further urged, on the authority of the case of *Raghu Nandan Jha v. Falpa Patuk* (3) that a decree-holder in the position of the present respondent cannot equitably obtain more than a fair and reasonable rent for the lands, if those lands had been let out to tenants during the period of unlawful occupation by the judgment-debtors. The true principle, as it seems to us, deducible from the authorities is that, on the facts of the present litigation, the decree-holder must be regarded as the potential, and therefore the actual, cultivator of the specific plots which were cultivated by the judgment-debtors from whom he succeeded in obtaining possession. The occupation of *khamar* lands in the direct cultivation of the *maliks* very nearly approximates to the occupation of *raiya* lands held by ordinary cultivators. In some instances, the proprietor cultivates his *khamar* lands by means of his own ploughs, utilising the labour of his servants ; in other cases, he may not take so much personal interest in the cultivation of such lands, and may prefer to employ hired labour and to exercise the necessary supervision over the cultivation by means of paid agents or factors. It does not, however, make any difference as to the principle upon which a

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(1) (1902) I. L. R. 29 Calc. 622.

(2) (1902) 6 C. W. N. 782.

(3) (1897) 3 C. W. N. 748.

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proprietor is equitably entitled to receive mesne profits for *khamar* lands which have been in the wrongful cultivation of others and from which they did not get anything in the shape of rent. The judgment-debtors withheld their papers, and the utmost that they can urge, on the facts of the present case, is that the learned Subordinate Judge ought to have deducted some percentage in addition to the ordinary costs of cultivation which have been allowed by the Civil Court Amin. That percentage, we think, may fairly be calculated, in the case of *khamar* lands, at half the usual rate on account of collection charges allowed in the case of rent-paying or *jote* lands. The term "collection charges," in the latter case, would include a larger establishment, and it would be much more elastic than the ordinary cost of supervising what may be called home-cultivation. We think that 5 per cent on the value of the actual produce of the *khamar* lands may be regarded as a sufficient allowance to meet the costs of supervision and any other incidental charges for which a proprietor, who is not an ordinary cultivator of his *khamar* lands, may be liable, and to that extent the judgment-debtors may benefit in the calculation of the mesne profits which they should be called upon to pay. These observations dispose of the first and third contentions on behalf of the judgment-debtors.

There is no force in the second contention, that is, as regards the apportionment which the judgment-debtors urge should be made as between themselves. The case cannot be sent back to the lower Court at this stage for an enquiry to be held into the different degrees of interest they possessed in the different plots held by them, in virtue of their alleged *sikmi* right, before possession was delivered to the decree-holder. The decree was passed against all the judgment-debtors jointly; their *sikmi* was set aside; and we entertain no doubt that the possession of 5 annas 5 gundas share in the *taluk* carries with it a right to obtain mesne profits not merely from the individual *sikmidars*, but from the entire body of the judgment-debtors who were in possession of that share. The *sikmi* taluk set up by the judgment-debtors extended to that share; the specific plots in respect of which mesne profits have been calculated on the basis of actual produce were integral parts of the share purchased by the decree-holder; and this view having been affirmed by this Court on appeal, the question is no longer open to discussion. The defendants other than defendants 2, 3, 29 and 30 are not also before us, the

later four defendants having appealed against the plaintiff without making the other defendants parties to the appeal, and we cannot make any order affecting their interest in their absence.

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The remaining contention, however, is one which ought to prevail. We may observe that no objection was taken in the Court below or before us with regard to the period limited by the terms of section 211 of the Code and the extended period of over six years for which mesne profits have been allowed in the present case. No doubt, a claim for mesne profits includes, and must include, interest on such mesne profits. This was pointed out by their Lordships of the Judicial Committee in the case of *Grish Chunder Lahiri v. Soshi Shekhareswar Roy* (1). Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by section 211 of the Code, and, in the exercise of a proper discretion, the higher rate of 12 per cent. should, in our opinion, cease after December 1899 when possession was obtained by the decree-holders. The usual rate of interest allowed by the Court on money decreed and pending realization by process or awaiting enquiry in ascertainment conducted by order of, or before the Court, is 6 per cent. only, and the account must be taken to have been made up, as against the judgment-debtors, from the date when the decree-holders superseded them in possession of the land decreed. In other words, the penal rate, as we may call it, of 12 per cent. should terminate when the wrong doing of the defendants came to an end, thereafter, the usual court rate should be allowed.

The result is that mesne profits must be ascertained on the principles which we have indicated and which were the principles adopted by the lower Court, but subject to a deduction of 5 per cent. on the produce of the khamar lands. In making the calculation of interest, the higher rate of 12 per cent. will be limited to the annual amounts accruing from the 29th. March 1893, up to the end of December 1899, year by year, and the lower rate of 6 per cent. will be applied from the 18th. January 1900, up to 7th. August 1905, the dates being taken from the decree of the Subordinate Judge.

Costs will be in proportion to the success of the judgment-debtor appellants and the decree-holder respondents.

A. T. M.

Appeal allowed.

(1) (1900) L. R. 27 I. A. 110 (124) ; I. L. R. 27 Calc. 951.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

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AND OTHERS

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Sanad, construction of—Mokarari, grant of—Revision of rent, if in perpetuity—Set off—Res judicata—Code of Civil Procedure (Act XIV of 1882), Sec. 13—Non-realization of rent for many years, effect of—Landlord and tenant—Batta, agreement to pay, if and when legal.

On the construction of the *sanad*, which recited that by a previous grant, Rs. 72 had been fixed as the annual horse expenses of the lessee to be paid out of *mokarari* rent of Rs. 250, and as the lessee had with the consent of the donor taken a transfer of the *mokarari* interest, the sum of Rs. 72 was to be annually set off against the *mokarari* rent, and the remainder Rs. 178 was remitted for the kitchen expenses of the lessee and for feeding the poor and occasional visitors and which concluded with the following statement, *viz.*, "This *sanad* is, therefore, granted to Shah Pir Mahomed Saheb, as regards the remission of Rs. 250 being the amount of *mokarari* rent of mouzah Kaler, and according to this *sanad*, the Shah Saheb as well as his heirs shall get acquittances year after year from my *cutchery* :

Held, that there was no maintenance grant in perpetuity to the lessee or donee and his descendants from generation to generation, nor was there even a maintenance grant to the donee and his heirs, but that there was a maintenance allowance granted to the donee and his heirs then living.

Bilasmuni v. Sheo Pershad (1), *Harihar Buxsh v. Uman Pershad* (2), *Dosibai v. Inwardas* (3), *Rajah Rameshar Buxsh Singh v. Arjun Singh* (4) and *Raja Pudmanund Singh Bahadoor v. Hayes* (5) distinguished.

Per Stephen, J.—Where in a previous litigation the question was whether the heirs of the grantee were entitled to claim the remission of rent and the same question, that is, as to a permanent remission of rent is raised in a subsequent litigation by the transferees from the representatives of the original grantee, the decision in the former litigation does not amount to *res judicata*.

A claim for *batta* being a claim in excess of rent is not enforceable at law.

Per Mookerjee, J.—The Revenue Courts are Courts of limited jurisdiction, and notwithstanding the decision of the Collectorate Court, a suit may be brought in the ordinary Civil Court to establish the character of the land in suit, that is whether it is rent-free or rent-paying; in other words, the Revenue Court and the Civil Court are not Courts of concurrent or equal jurisdiction for the purposes of a suit to declare finally, whether the land is rent-free or liable to pay rent.

* Appeal from Appellate Decree No. 2023 of 1905, against a decree of C. E. Pitter, Esq., District Judge of Gaya, dated the 29th June 1905, affirming that of Babu D. C. Mazumdar, Munsiff of Gaya, dated the 1st December 1904.

(1) (1882) L. R. 9 I. A. 33 (35); I. L. R. 8 Calc. 664.

(2) (1886) L. R. 14 I. A. 7 (16); I. L. R. 14 Calc. 296.

(3) (1891) L. R. 18 I. A. 22; I. L. R. 15 Bom. 222.

(4) (1900) L. R. 28 I. A. 1; I. L. R. 23 All. 194.

(5) (1901) L. R. 28 I. A. 152; I. L. R. 28 Calc. 720.

A decision of the Revenue Court may be evidence, but it is by no means conclusive upon the issue whether the land is rent-free or rent-paying.

Hurri Sunker Mookerjee v. Muktarom Patro (1), *Khugowlee Singh v. Hossein Buz Khan* (2), *Chunder Coomar Mundul v. Nunnee Khanun* (3), *Ram Kishori v. Raja Ram* (4) and *Ram Dass v. Rash Monee* (5) referred to.

A maintenance grant is *prima facie* for the life of the grantee.

Woodoyaditto v. Mukund (6) and *Rajah Rameshar Baksh v. Arjun Singh* (7) referred to.

But the presumption may be rebutted, either by the express provisions of the grant, or where the terms of the original grant are unknown, by long course of conduct of the parties concerned.

Ram Chandra v. Jogendra Nath (8) referred to.

When the relation of landlord and tenant exists between two persons in respect of any property, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship of landlord and tenant has ceased.

Troyluckho Tarinee v. Mohina Chander (9), *Elahee Buksh v. Shaikh Janoo* (10), *Rungo Lall v. Abdool Guffoor* (11), *Tatia v. Sadashiv* (12), *Bama Charan v. Administrator-General* (13), *Degumber Mitter v. Ram Soonder Mitter* (14) and *Thakooranee Dossee v. Bisheshur Mookerjee* (15) referred to.

Batta is not *abwab*, if it is merely an allowance for the exchange of sicca rupees into Company's rupees, the latter of which was introduced by Act XVII of 1835, and the former ceased to be legal tender by Act XIII of 1836. If the rent claimed has been fixed before 1836, *batta* is *prima facie* not an *abwab*, but if it has been fixed subsequently, it is *prima facie* an *abwab*.

Chucken Sahoo v. Roop Chand (16), *Ram Saran Sing v. Gyan Sing* (17) and *Ram Khelwan Singh v. Kumar Rai* (18) referred to.

Appeal by the Plaintiffs.

Suit for rent.

The facts of the case appear fully from the judgments.

Babus Umakali Mookerjee, Lachmi Narain and Kulwant Sahay for the Appellants.

Mr. Hug, Mr. Shureef and Babus Kali Krishna Sen and Chandra Sekhar Prasad Singh for the Respondents.

C. A. V.

The following judgments were delivered by

Stephen J.—This appeal arises in a rent-suit brought by the appellant whose claim for three years' rent has been dis-

August, J.

(1) (1875) 15 B. L. R. 238 ; 24 W. R. 154.

(2) (1871) 7 B. L. R. 673 ; 15 W. R. P. C. 30.

(3) (1873) 11 B. L. R. 434 ; 19 W. R. 322.

(4) (1903) 1 L. R. 26 All. 468.

(5) (1876) 25 W. R. 189.

(6) (1874) 22 W. R. 225.

(7) (1900) L. R. 28 I. A. 1 ; 1 L. R. 28 All. 194.

(8) (1905) 4 C. L. J. 399.

(9) (1867) 7 W. R. 400.

(10) (1875) 24 W. R. 386.

(11) (1878) 1 L. R. 4 Calc. 314.

(12) (1882) 1 L. R. 7 Bom. 40.

(13) (1907) 6 C. L. J. 72.

(14) (1856) S. D. A. 617.

(15) (1865) B. L. R. F. B. 202 (321-322).

(16) (1848) S. D. A. 680.

(17) (1887) 6 C. L. J. 637.

(18) (1892) 6 C. L. J. 667.

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allowed in both Courts below. The rent is claimed in respect of three mouzahs, originally in the possession of one Maharaja Mode Narain Singh ; and the plaintiffs, as his representatives, are admittedly entitled to any rent that may be due in respect of them. The defendants, however, maintain that no rent is due, and that the matter in dispute is *resjudicata*.

The facts of the case are as follows :—Before the 24th. October 1859, one Shah Pir Mahomed Shah was in possession of a mokarari right in the mouzah in question at a rent of Rs. 250 payable to Mode Narayan as landlord, and he, on that day, remitted payment of all this rent in terms that we shall have to consider carefully hereafter. On the 18th. December 1859, Pir Mahomed conveyed all his interest to his wife Massamat Ladli Begum, from whom and her heirs, it passed by two sets of conveyances to the predecessors in title of the defendants in the proportion four annas to the first and twelve annas to the second. The suit on which the plea of *resjudicata* is based, was for the recovery of rent for the mouzah in question, and was brought by the widows of Mode Narayan against Ladli the widow of Pir Mahomed, his son, and two of his daughters, as his heirs in 1867. Since this suit no attempt has been made to realise any rent for the land in question.

On these facts the first thing to do is to determine what rights were created by Mode Narayan's *sanad* of 24th. October 1859 ; next, to see how those rights were dealt with, and, lastly to see whether the litigation of 1867 is a bar to the present suit.

The *sanad* then commences with recitals showing that at the date it was made, Pir Mahomed had a mokarari right in the mouzah at a rent of Rs. 250, subject to a deduction of Rs 72 allowed to provide for his expenses in keeping a horse. His right to this deduction is then confirmed, and a further deduction of Rs. 178, the balance of the rent due, is " remitted for the kitchen expenses of Shah Sahib, and for feeding the poor and the occasional visitors. It then continues : " this *sanad* is, therefore, granted to Shah Pir Mahomed Shaib as regards the remission of Rs. 250 being the amount of the mokarari rent of mouzah Kaler, and according to this *sanad* the Shah Sahib, as well as (or together with) his heirs shall get Faragh Khattis (acquittances) year after year from my katchary." On behalf of the appellant it is argued that this document did no more than give a maintenance grant to Pir Mahomed and heirs of his who were then alive. The respondent, on the other hand, maintain that the grantor gave up

for ever his right to rent from the mokararidar, and, in fact, made the land lakhiraj. In considering the terms of the *sanad*, in view of these contentions, it is plain that if the *sanad* had stopped at the end of the first passage quoted above, the remission of rent would be a privilege personal to Pir Mahomed, and the construction of the document for present purposes must, therefore, depend on its concluding passages quoted above. In terms the rights of the heirs are limited to the receipt of acquittances, but as this would be meaningless, I must read the passage as though the mention of Pir Mahomed's heirs had occurred after the first mention of his name. The result is that I take the remission of rent as granted to Pir Mahomed and his heirs, the term properly used to make the most extensive grant that the grantor was capable of making. At the same time what was granted was, in terms, only a remission of payment and this was coupled with an obligation to take annual receipts for the remitted rent which served both to preserve the landlord's right to receive rent and to record that rate of that rent as Rs. 250 a year. The whole must be read together, and the result is that I cannot regard the words of the grant as making the land lakhiraj, as the obligation to pay rent is preserved subject to the preceding grant. What their effect was from a positive point of view, it is not easy to say. On well-known principles, common both to Hindu and Mahomedan Law, they certainly confer a right to a remission of rent to Pir Mahomed and his heirs living at the time of the grant : and had the mouzah remained in the hands of Pir Mahomed's heirs, questions as to perpetuity might have arisen which I need not consider under the present circumstances. Some of the heirs at any rate had a right not to pay rent, but the obligation to pay it was not abolished and thus remained an incident of the tenure like any other covenant. Both Pir Mahomed and his heirs may have had a right to transfer the tenure, but there is nothing in the *sanad* to show that they had a right to transfer with it the exemption from payment of rent that they enjoyed. A consideration of the earlier part of the *sanad* confirms me in this view. The exemption from payment of rent was granted to Pir Mahomed for specified reasons, namely to provide him with a horse allowance and to enable him to feed himself, the poor, and occasional visitors. These reasons might not apply to the grant of any thing to his heirs, but they would apply still less to the enjoyment of the exemption by their assignees. We have been referred by the appellant to the decisions of the Judicial Committee in *Rajah*

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Rameshar Baksh Singh v. Arjun Singh (1) and *Raja Pudmanund Singh v. Hayes* (2), as authorities to show that where a grant is one for maintenance, words tending to show an absolute grant are not to have their natural effect. The facts of the cases, however, in one of which the grant was for maintenance in perpetuity, and in the other of which there was a prohibition of alienation, seem too different from those before us to afford much aid in the construction of the present document.

I have next to consider by what steps the heirs of Pir Mahomed divested themselves of their property in order to see whether anything occurred at the time of their conveyances to the predecessors in title of the defendants that can be considered as giving them a claim to the exemption enjoyed by their grantors. The property was dealt with, as far as we are concerned, in four deeds. As regards 4 annas the darmokarari right was transferred on 10th January 1871, and the complete mokarari right on the 4th June 1882 to predecessors in title of the second respondent; the darmokarari and mokarari rights in the remaining 12 annas were sold to the predecessors in title of the second defendant on the 12th January 1871 and the 19th August 1878. The grantors in all the sales were Musst. Ladli or her heirs, and it is possible that all of them were alive and heirs to Pir Mahomed at the time of the *sanad* of 1859, though this is not a matter of importance. The only deeds before us are those relating to the second set of sales; those referring to the 12 annas. In the earlier of these, the conveyance of a darmokarari right, Musst. Ladli herself, presumably relying on the decision in her favour in 1867, conveys as the assignee of Pir Mahomed and expressly states that the rent has been permanently remitted by the *sanad* of 1859, and undertakes to get the mouzah released, if attached, and to pay any jama fixed therefor. In the second conveyance, dated 19th August 1878, the principal grantors profess to be acting as heirs of Musst. Ladli, deceased, and her possession of the property as her right is recited. The property conveyed is all the rights they have therein; and though the remission of rent by Mode Narayan is recited, no mention is made of the possibility of the attachment of the mouzah. There is nothing to show that the plaintiffs or their predecessors in title were in any way party to either set of deeds.

Under these circumstances, I must suppose that the deeds we

(1) (1900) L. R. 28 I. A. 1; I. L. R. 23 All. 194.

(2) (1901) L. R. 28 I. A. 152; I. L. R. 28 Calc. 720.

have not seen correspond with those that we have ; and on a consideration of the latter, there can be no doubt that grantors of the tenures conveyed all the interests they possessed. What the effect of this may be, as far as they are concerned, we need not enquire : but there is nothing in the deeds that we have seen to suggest that the plaintiffs can be considered in any way a party to them ; or that affects the rights which we consider that the grantor of the deed of 1859, reserved for himself.

The ground of *res judicata* put forward by the respondents remains to be considered. This depends on the judgment of the Deputy Collector of Gaya in a suit in which the widows of Mode Narayan sued the widow and other heirs of Pir Mahomed for rent for the mouzah in question. The judgment is dated the 27th February 1867, and though it was appealed against and the matter was remitted by the High Court to the Judge of Gaya for a re-hearing, it ultimately stood. The decision turns entirely on the question whether or not the words "as well as his heirs" were an interpolation, and it was decided they were not. The effect of the deed was not considered, and on the very likely supposition that the defendants had all been alive at the time of the *sanad*, it is not easy to see how it could have been. But unless the assignees stood in the same position as the heirs, that is, unless the *sanad* enabled the heirs to assign the exemption from payment of rent with the rest of their estate, the decision cannot give them any rights. And this throws us back on the construction of the *sanad*, a matter that I have already considered. The respondents claim under the defendants to the suit litigating under the same title ; but only as assignees of their tenure, of which I have held that an exemption from payment of the rent of that holding was not a part. Consequently, I hold that the plea of *res-judicata* fails.

The result is that the appeal must be allowed. The plaintiffs originally sued for certain cesses which they succeeded in recovering in the first Court. The defendant appealed against this decision in the lower appellate Court but the appeal was not pressed. The plaintiff appellant sued for *batta* at a certain rate—a claim that was disputed by the defendants and which cannot be supported,—being, as it is, a claim in excess of rent.

The appeal is, therefore, allowed and the decree of the lower Court must be varied by allowing to the plaintiff rent for the years 1308 to 1311 at the rate of Rs. 250 and cesses in proportion. The plaintiff must have interest as provided under section 67 of

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the Bengal Tenancy Act to the date of suit and interest there-
 after till realisation at 6 per cent. Each party will pay his own
 costs in all the Courts.

Mookerjee J.—The circumstances, which gave rise to the
 litigation out of which the present appeal arises, are not in contro-
 versy in this Court, and may be briefly narrated. In 1845, Raja
 Mode Narayan of Tikari, now represented by the plaintiffs appel-
 lants, granted a *mokarari* of mouzah Kaler to Sayed Kurshud Ali.
 The tenure was permanent and the rent reserved was Rs. 250 a
 year, fixed in perpetuity. On the 12th. August 1855, Kurshud Ali
 made a gift of his *mokarari* interest to his spiritual guide Shah
 Pir Mahomed Saheb. On the 24th. October 1855, Raja Mode
 Narayan Singh, granted a *sanad* to Shah Pir Mahomed, the legal
 effect of which is the substantial matter in dispute between the
 parties to this litigation. The deed recited that by a previous
 grant, Rs. 72 had been fixed as the annual horse expenses of the
 Shah Saheb to be paid out of the *mokarari* rent of Rs. 250, that
 as the Shah Saheb had, with the consent of Raja Mode Narayan
 taken a transfer of the *mokarari* interest, the sum of Rs. 72 was
 to be annually set off against the *mokarari* rent, and that the remain-
 der Rs. 178 was remitted for the kitchen expenses of the Shah
 Saheb and for feeding the poor and occasional visitors. The deed
 concluded with the following statement : " This *sanad* is, therefore,
 granted to Shah Pir Mahomed Saheb, as regards the remission of
 Rs. 250 being the amount of *mokarari* rent of mouzah Kaler, and
 according to this *sanad* the Shah Saheb as well as his heirs shall
 get acquittances year after year from my *cutchery*." On the 8th.
 December 1859, the Shah Saheb transferred his interest in the
mokarari to his wife Ladli Jan Begum. After the death of Raja
 Mode Narayan and of the Shah Saheb, about the year 1866, the
 representatives of the former sued the widow, the son and the
 daughters of the latter for rent of the *mokarari* in respect of the
 years 1864 to 1866. The widow resisted the claim on the ground
 that not only the grantee Shah Saheb, but also, his heirs were
 entitled to the benefit of the remission of rent conferred by the
sanad of the 24th. October 1855. The son and the daughter
 appear to have resisted the claim on the ground that they were
 not liable, as the *mokarari* had been transferred to their mother
 by their father during his life time. The plaintiffs questioned the
 genuineness of the *sanad* and asserted that in any event the
 words " as well as his heirs " in the concluding sentence of the
sanad were interpolated. The Deputy Collector who tried the

case under Act X of 1859, held that the *sanad* was genuine, that there was no interpolation in it, and that the plaintiffs were not entitled to claim rent against the heirs of the Shah Saheb. This decision was affirmed by the District Judge. Upon appeal by the plaintiffs to this Court, the case was remanded for retrial upon fresh evidence. The plaintiffs, however, did not prosecute the case before the District Judge, and he consequently affirmed the order of the Court of first instance on the ground that the plaintiffs had failed to adduce proof of the soundness of their objections to the *sanad* produced by the defendants. It does not appear that the landlords made any further attempt to realize rent from the heirs of the Shah Saheb. On the 10th. January 1871, Ladli Jan, the widow of the Shah Saheb granted a *dur-mokarari* of four annas of the village to Baiju Lal and Gobardhan Lal, who sold their interest to Enyet Hossain, now represented by the second defendant, on the 17th March 1882. On the 4th June 1882, the four annas of the *mokarari* interest which corresponded to the four annas of the Subordinate *dur-mokarari* was transferred to Enyet Hossain by the representatives of Ladli Jan. On the 12th January 1871, Ladli Jan granted a *dur-mokarari* in respect of the twelve annas share of the village to one Sham Lal, now represented by the first defendant. On the 19th August 1878, the twelve annas share of the *mokarari* which corresponded to the twelve annas share of the subordinate *dur-mokarari* was transferred to Sham Lal by the representatives of Ladli. The result of these transactions was that on the 4th June 1882 the heirs of the Pir Saheb completely lost all connection with the *mokarari*; till that date, the representatives of Ladli retained an interest in the four annas of the *mokarari*, the remainder of which they had transferred to Sham Lal in 1878. On the 2nd June 1904, the plaintiffs commenced this action for recovery of arrears of rent for the years 1308 to 1311 (1901-1904). Rent is claimed at the rate of Rs. 250 together with *batta*, that is allowance for the exchange of *sicca* rupees into Company's rupees. The claim also includes the usual cesses. The defendants resisted the claim substantially on three grounds, namely, *first* that upon a true construction of the *sanad* of 1855, the rent had been remitted in perpetuity, and the *mokarari* converted into a rent-free grant; *secondly*, that the decision in the litigation of 1866 operated as *res-judicata*, and *thirdly*, that as the plaintiffs had not realized any rent for more than twelve years, the plaintiffs were not entitled to enforce their

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rights, if any. Objection was also taken to the claim for damages &c. The Court of first instance dismissed the claim for rent, but allowed the claim for cesses. Upon appeal by the plaintiffs, this decision was affirmed by the District Judge, on the ground that although the decision in the previous suit did not operate as *res judicata*, the *sanad* must be taken to have effected a permanent remission of the rent. The plaintiffs have now appealed to this Court, and on their behalf the decision of the District Judge has been challenged on the ground that the *sanad* did neither extinguish the tenancy nor convert it into a rent-free grant, and that whatever the privileges of the heirs of the Shah Saheb might have been, the defendants, as transferees, are at any rate not entitled to claim any remission. This view of the effect of the *sanad* has been controverted on behalf of the respondents, and in addition, it has been urged that the matter is concluded by the decision in the rent suit of 1866; stress has also been laid on the fact that although the transfers took place in 1878 and 1882, no endeavour has been made by the landlords till the present suit was brought, to collect any rent from them. It is necessary to examine the question of *res judicata* first, because if the contention of the respondents upon this point is well founded, no other ground requires examination.

As regards the binding character of the decision of the Revenue Court in the rent suit of 1866, it is clear from the decision of a Full Bench of this Court in the case of *Hurri Sunker Mookerjee v. Muktaram Patro* (1), that it is not conclusive upon the question, whether the effect of the *sanad* of 1855 was to create a rent-free grant in perpetuity in favour of the Pir Saheb. In that case, a suit was brought in the Civil Court under Bengal Act VIII of 1869 to recover rent at an enhanced rate after notice. As to a portion of the land, the defendant pleaded that it was rent-free. In a similar suit previously brought between the same parties in the Revenue Court, whilst Act X of 1859 was in force, the right of the plaintiff to assess rent on this portion of the land had been expressly declared, and this declaration had been affirmed by the High Court. The question arose, whether the decision in the suit under Act X of 1859 operated as *res judicata*. It was held by the majority of the Full Bench that although the decision might be evidence, it was by no means conclusive upon the issue, whether the lands was rent-free or rent-paying. This conclusion was founded on the ground, that the Revenue Courts were Courts

(1) (1876) 15 B. L. R. 238; 24 W. R. 154.

of limited jurisdiction, and notwithstanding the decision of the Collectorate Court, a suit might have been brought in the ordinary Civil Court to establish the defendant's right to this land as *lakhiraj*; in other words, the Revenue Court and the Civil Court were not Courts of concurrent or equal jurisdiction for the purposes of a suit to declare finally, whether the land was rent-free or liable to pay rent. In the case before us, if the decision of the Revenue Court in the suit of 1866, had been in favour of the landlord, it would undoubtedly have *not* operated as above, in a subsequent suit in the Civil Court at the instance of the tenant for the trial of the issue, whether the tenure was rent-free. If so, it does not make any difference in principle, that the decision of the Revenue Court was in favour of the tenant. This view is supported by the decision of their Lordships of the Judicial Committee in *Khugowlee Singh v. Hossein Bux Khan*, (1), and by the decision of a Full Bench of this Court in *Chunder Coomar Mandul v. Nonnee Khanum* (2), [see also *Rani Kishori v. Raja Ram* (3)]. The result might have been different if the previous rent suit had been tried, not by a Revenue Court, but by a Civil Court, [*Ram Dass v. Rash Monee* (4)]. The question of *res judicata*, therefore must be answered against the respondents. It may be observed, that this point might have been answered against them upon a much narrower ground, namely, that the question now in controversy is, whether the transferees from the representatives of the original grantee are entitled to claim a permanent remission of rent, whereas the controversy in the litigation of 1866 was, whether the heirs of the grantee were entitled to claim the remission. I prefer, however, to rest my decision of this question upon the broader ground which entitles the plaintiff to raise the whole question of the genuineness as well as the legal effect of the *sanad* of 1855, whereas, if the decision was based on the narrower ground, the only question open would be, whether the *sanad* of 1855 created a rent-free grant the benefit of which could be claimed not only by the grantee and his heirs, but also by their assignees.

The next question, which requires decision is, what was the effect of the grant of 1855. The *sanad* recites in the first place, and confirms a previous allowance of Rs. 72 annually of which the Pir Saheb was in enjoyment; this allowance was apparently paid by the Raja out of the *mokarari* rent, but there is nothing to

(1) (1871) 7 B. L. R. 673; 15 W. R. (P. C.) 30. (3) (1903) I. L. R. 28 All 468.
 (2) (1873) 11 B. L. R. 434; 19 W. R. 322, (4) (1876) 25 W. R. 169.

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indicate that it had been made a charge thereupon. The *sanad* next recites that the Pir Saheb had acquired the *mokarari* with the approval of the Raja, and had consequently become liable for the payment of Rs. 250 a year as rent. The *sanad* then directs the sum of Rs. 72 to be set off against the annual rent, and remits the balance, Rs. 178 annually for the maintenance of the Pir Sahib and to enable him to feed the poor and occasional visitors. If the deed had stopped here, there can be no question, in my opinion, that the remission could be construed only as a personal one, to last only during the life-time of the grantee. The cases of *Woodoyaditto v. Mukoond* (1), and *Rajah Rameshar Baksh v. Arjun Singh* (2), indicate that a maintenance grant is *prima facie* for the life of the grantee, although no doubt, as shown in *Ram Chandra v. Jogendra Nath*, (3), the presumption may be rebutted, either by the express provisions of the grant, or where the terms of the original grant were unknown, by the long course of conduct of the parties concerned. In the case before us, is there anything to indicate that the remission was perpetual, and the intention of the landlord was to convert the *mokarari* into a perpetual rent-free grant? On behalf of the landlord, reliance is placed upon the concluding words of the deed which make it obligatory upon the holder of the tenure to get acquittances year after year from the office of the landlord. This undoubtedly shows that the landlord had no intention to make a rent-free grant; the deed assumes that the rent would accrue due every year and that the holder of the tenure should take an acquittance therefor. Reliance on the other hand is placed on behalf of the defendants, upon the words which entitle the Pir Saheb and his heirs to get acquittances, and it is argued that this indicates that the Pir Saheb and his heirs were granted a maintenance allowance in perpetuity. It will be observed, however, that there is no mention of the heirs in any previous portion of the document; no reference is made to them in connection with the annual allowance of Rs. 72, nor is their existence, even limited at, in connection with the remission of Rs. 178. It is unlikely, that if the grantor should have intended to make any maintenance grant in perpetuity in favour of the heirs of Pir Saheb from generation to generation, they should not be mentioned anywhere in the deed, except incidentally in a clause relating to the grant of acquittances receipts. The learned

(1) (1874) 22 W. R. 225.

(2) (1900) L. R. 28 I. A 1; I. L. R. 23 All. 194. (3) (1905) 4 C. L. J. 399.

vakil for the appellants suggested with some plausibility, that the words 'my *warisan*' (heirs) were interpolated and that, that was the only place in the deed where the words could be safely interpolated. It is, however, not necessary to deal with this matter in detail, first because a similar contention was not established in the litigation of 1866, and secondly because, although the appearance of the deed in the particular portion, where the disputed words occur, may not be quite free from suspicion, there are no facts found, upon which this Court could come to any conclusion on the point. Even if we take the deed, however, as it stands, it is to my mind reasonably plain, that there was no maintenance grant in perpetuity to the Pir Saheb and his descendants from generation to generation. The cases upon which reliance was placed, namely, *Bilasmari v. Sheo Pershad* (1), *Harihar Buksh v. Uman Parshad* (2), and *Dosibai v. Ishwar Das* (3), are of no assistance to the respondents; they turned upon the construction of deeds executed under totally different circumstances and couched in entirely different language. As I have already pointed out, there is no grant in this case of a maintenance allowance, to be enjoyed from generation to generation, nor is there even a maintenance grant to the Pir Saheb and his heirs. The construction, most favourable to the respondents which could possibly be put upon the deed, would be to hold, that there was a maintenance allowance granted to the Pir Saheb and his heirs then living; if it was intended to do anything more, whether it might not be a violation of the rule against perpetuities, may be a question of some nicety. I do not think it is possible to hold, that there was a grant in perpetuity to the Pir Saheb which would operate as an absolute grant, with the result that the maintenance allowance could be transferred to a stranger. Even if we assume, however, that the grant was of this description, the respondents are in this difficulty, that the right to receive maintenance has not been transferred to them; they have purchased nothing beyond the tenure, and as they have not acquired the right to receive the allowance, or to have it set off against the rent as it falls due, they are liable to pay rent to the plaintiff. My conclusions, therefore, are, *first*, that the effect of the deed of 1855 was not to destroy the tenure and to substitute for it a rent-free grant in perpetuity, no matter, whether the property continued in the possession of the Pir Saheb or his heirs or their

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(1) (1882) L. R. 9 I. A. 33 at 38; I. L. R. 8 Calc. 664.

(2) (1886) L. R. 14 I. A. 7 at 16; I. L. R. 14 Calc. 296.

(3) (1891) L. R. 18 I. A. 22; I. L. R. 15 Bom. 222.

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assignees; *secondly*, that if the deed created a maintenance allowance intended to last beyond the life-time of the Pir Saheb, it might only operate as to the heirs, then living; and *thirdly*, that if the deed be construed to have created an absolute grant of maintenance allowance, alienable at the option of the grantee or his representatives, the defendants have not acquired any right thereto under their purchases. In any view of the matter, the defendants are not entitled to a set off against the rent due on the *mokarari*, and they have consequently no substantial defence to the claim of the plaintiff. Much stress was laid on behalf of the respondents upon the circumstance, that no rent has been claimed for many year past, and that not only were the landlords defeated in their suit against the heirs of the Pir Saheb, but that they have not at any time demanded rent from the assignees of the heirs whose title accrued in 1882. It is well settled, however, that when the relation of landlord and tenant exists between two persons in respect of any property, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship of landlord and tenant has ceased. [See *Troyluckho Tarinee v. Mohima Chunder* (1), *Elahee Buksh v. Shaik Janor* (2), *Rungo Lall v. Abdool Guffoor*, (3), *Tatia v. Sadashiv* (4), *Bama Charan v. Administrator-General*, (5). In the case last mentioned, a decree for rent was made, although no rent had been paid for nearly half-a-century. [See also the observations in the case of *Degumber Mitter v. Ramsoonder Miiter* (6), referred to with approval by Peacock, C. J., in *Thakooranee Dossee v. Bisheshur Mookerjee* (7). It is clear, therefore, that the plaintiffs are entitled to claim rent from the defendants. As regards the amount claimed, it is clear, that the *batta* must be disallowed. It was ruled by the Sudder Court in *Chucken Sahoo v. Roop Chand* (8), that *batta* is, not an *abwab*, if it is merely an allowance for the exchange of sicca rupees into Company's rupees the latter of which was introduced by Act XVII of 1835 and the former ceased to be legal tender by Act XIII of 1836. If the rent claimed has been fixed before 1836, *batta* is *prima facie* not an *abwab*, but if it has been fixed subsequently, it is *prima facie* an *abwab*. [See also *Ramsaran Sing v. Gyan Sing* (9) and *Ram Khelwan Singh v. Kumar Rai* (10). In the

(1) (1867) 7 W. R. 400.

(6) (1856) 8. D. A. 617.

(2) (1875) 24 W. R. 386.

(7) (1865) B. L. R. F. B. 202 at 321-3 22.

(3) (1878) I. L. R. 4 Calc. 314.

(8) (1848) S. D. A. 680.

(4) (1882) 7 I. L. R. 7 Bom. 40.

(9) (1887) 6 C. L. J. 637.

(5) (1907) 6 C. L. J. 72.

(10) (1892) 6 C. L. J. 667.

case before us, the tenancy originated in 1845, the plaintiffs, therefore, are not entitled to claim any *batta* on the rent fixed.

The result, therefore, is that this appeal must be allowed, the decree of the District Judge varied and a decree made in favour of the plaintiffs for rent for the years 1308-1311 at the rate of Rs. 250 annually and cesses in proportion. The plaintiffs will also have interest under section 67 of the Bengal Tenancy Act up to the date of suit, and interest thereafter upon the total amount decreed at the rate of 6 per cent. per annum up to the date of realisation. Each party will pay his own costs in all the Courts.

B. M.

Appeal allowed.

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PRIVY COUNCIL.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

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AND

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[ON APPEALS FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Suit for redemption—Mortgage deed, construction of—Compound interest—Maintenance cost—Enhanced Government revenue—Arrears of rent—Rent, statute barred or otherwise—Previous suit for possession—Account filed therein—Estoppel—Recovery of costs thereof—Practice—Point not taken before either of the lower Courts, whether the same was open before their Lordships.

On the true construction of clause (4) of the mortgage-deed, which provided that 'in case of default in payment by me (mortgagor) of instalments of interest at the time herein appointed, the mortgagee shall have immediately on such default, power either to recover the whole of his principal, interest and (*sud mazid munafa mazhura*) further interest on the said interest according to the rate herein fixed, ; or the said mortgagee shall in default of payment of the instalment or instalments of interest aforesaid take possession of the mortgaged property ; their Lordships

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agreed with the lower appellate Court that the mortgagor was not liable for compound interest since the mortgagee entered into possession of the mortgaged premises.

Their Lordships upheld the concurrent finding of both the lower Courts that under the mortgage deed in this case, the mortgagee was entitled to get from the mortgagor over and above the usufruct of the mortgaged property, the amount paid by him on account of maintenance and enhanced Government revenue.

Under clause (10) of the mortgage deed in question, which provided that 'whenever after the term of the mortgage or during the said term I (mortgagor) pay to the mortgagee in any *khali fasl* (fallow season) i.e., in the month of Jeith, the whole of the mortgage money and the whole of interest together with Government revenue, arrears of rent, and *takari* advances due from tenants, and other expenses incurred under the terms of this document, without raising any objection of law such as limitation, etc., I, the mortgagor shall have power to redeem the mortgaged property,' their Lordships agreed with the lower Courts that the mortgagee was entitled against the mortgagor to arrears of rent due from tenants even where such arrears were statute-barred as against the tenants.

The mortgagee brought a suit against the mortgagor alleging that at the date of the suit there was due to him a sum of Rs. 33,087-13-3½ and praying for a decree for possession of the property or in the alternative for recovery of that sum with further interest. A Commissioner appointed to make up the accounts reported that Rs. 33,087-9-8½ were due to the mortgagee at the date of the suit. The Court in giving judgment held that there was no necessity for passing an order as to the amount due under the mortgage beyond saying that the account was correct and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It was contended by the mortgagee in a subsequent suit brought against him by the mortgagor for redemption of the mortgaged property, that the decree in the previous suit must be accepted as settling the amount due to the mortgagee on the date of that suit.

Held, by their Lordships, who adopted the conclusion of the lower appellate Court, that nothing had occurred in the previous suit to raise an estoppel against the mortgagor and, therefore, he might in the subsequent suit show if he could, that under the terms of the deed compound interest was not payable.

The mortgagee was not entitled to recover the costs of the previous suit in the absence of any provision in that behalf in the mortgage deed.

A point not taken by a party before either of the lower Courts was not open to him at the time of the hearing of the appeal before their Lordships.

Consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh (July 27, 1904), which varied a decree of the Court of the Subordinate Judge of Bara Banki (November 29, 1902).

The principal question involved in the case was the settlement of the terms on which the above-named Muhammad

Naseem, hereinafter called the appellant, was entitled to redeem a mortgage, dated September 30, 1885.

The said mortgage was executed by Chaudhri Imdad Ashraff in favour of the above-named Mirza Muhammad Abbas Ali Khan, hereinafter called the respondent. The property mortgaged, was the whole village of Ilyaspur, an 8 anna share in the villages of Husainabad, Patti Yakub, and Karmeman, and a 6 anna share in the village of Olhepur. The term of the mortgage was for 10 years, the amount of the mortgage-money was Rs. 29,000 and the rate of interest payable was Rs. 0-13-4 per mensem, *i.e.*, 10 per centum per annum. The material clauses of the mortgage-deed were the following :—

(II). The gross-rental of the entire village and the shares in the villages that are mortgaged amount to Rs. 6,003-8-6 according to the (*zemindari*), assessment (*taradud*) of 1293 Fasli ; and after deducting Government revenue and other expenses, the net profits of the said village and shares amount to Rs. 3,640-5-6.

(III).—As the said mortgagee has entered into this mortgage transaction on the faith of the statements made by me, the mortgagor, without himself making any enquiry into the rental, etc., of the mortgaged village and shares, he shall have the right to realize before the expiry of the term of mortgage, by aid of the Court, the entire amount of principal with interest from me (personally), as well as from the mortgaged property and every other movable and immovable property of any kind belonging to me, together with costs and future interest at the rate stipulated for in this deed, if on enquiry by the mortgagee, made now or in future, the rental, expenses, and profits stated by me, be found to be deficient or in excess (*i.e.*, the rental and profits be deficient and the expenses be in excess).

(IV).—That without making any excuse based on earthly and heavenly calamities, or of drought, hail-storm, etc., I, the mortgagor, shall pay the interest every year at the rate of 13 annas 4 pies per cent. per mensem amounting to Rs. 2,900 per annum, by two equal instalments payable every six months to the mortgagee at Lucknow till the redemption of the mortgage. In case of default in payment by me of the instalments of interest at the time herein appointed, the mortgagee shall have, immediately on such default, power either to recover the whole of his principal, interest, and (*sud mazid munafa mazkura*) further interest on the said interest according to the rate herein fixed,

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by aid of the Court from myself as well as from the mortgaged property and from my other properties of every description, movable and immovable, together with costs of the suit, future interest at the fixed rate of 13 annas 4 pies as provided for in this document, and interest accruing due during the pendency of the suit till liquidation of the whole demand in the execution department at the aforesaid rate, without waiting for the expiration of the term of ten years provided for in this document, to which I and my representatives shall have no objection; or the said mortgagee shall in default of the payment of the instalment or instalments of interest aforesaid take possession of the mortgaged property.

(V).—That in the case of taking possession of the mortgaged property the mortgagee aforesaid shall have power immediately to have his name recorded in the Revenue papers in place of mine by mutation proceedings, costs of the proceedings being payable by me.

(VI).—That after coming into possession of the mortgaged property, the mortgagee shall have power as my representative in interest, to manage the property, to collect all the income of the village and shares mortgaged, *viz.*, rent (*mal*), *sewai*, and *semindari* dues, to eject tenants, to enhance or reduce rents, to make wells, to build houses of tenants, to advance *takavi*, to let the mortgaged property on *thika*, and to dismiss or appoint *Patwari* and *Chaukidars*.

(VII).—That while in possession of the mortgaged property, the mortgagee aforesaid shall, after payment of Government revenue and other amounts assessed by the Government which may hereafter be assessed or fixed by the Government, as well as the village expenses, pay off the establishment kept for making collections in the mortgaged property, costs of litigations, expenses incurred in settling tenants, building their houses, and making wells and *takavi* advances, etc., appropriate the balance towards the interest of the mortgage-money, irrespective of the fact that such balance exceeds the amount of interest due at the rate aforesaid; but if the said balance fall short of interest at the rate fixed by this deed, I shall be liable for the deficiency.

(VIII).—That the *semindari* dues which the said mortgagee realizes as my representative while in possession of the mortgaged property shall be disregarded in ascertaining the amount of interest received by the mortgagee and the declarant shall not call upon him to account for the same.

(IX).—That if during the time that the mortgagee is in possession the income of the mortgaged property is reduced or lost (entirely) owing to drought, hail-storms, new settlements, or other accidents, or if the mortgagee has to pay the Government revenue, etc., from his own pocket, or if any rights of interest in the mortgaged property are attached and proclaimed for sale in execution of any decree, or if the whole or any part of the mortgaged property passes out of my ownership on the claim of any person under the orders of the Government, then in all such cases the mortgagee shall have the right to recover the principal and interest together with other expenses specified in this deed from me personally and from the mortgaged property, as well as from my other properties of any description. I and my representatives shall have no objection to pay the same.

(X).—That whenever after the term of the mortgage or during the said term I pay to the mortgagee in any *khali fasl* (fallow season) *i.e.*, in the month of Jeith, the whole of the mortgage-money and the whole of interest together with Government revenue, arrears of rent and *takavi* advances due from tenants, and other expenses incurred under the terms of this document, without raising any objection of law such as limitation, etc., I, the mortgagor shall have power to redeem the mortgaged property.

(XI).—That I shall have power to pay the principal mortgage-money within the term of the mortgage by instalments, provided the amount of such instalment is not less than a thousand rupees, and interest on the instalments paid shall be credited to me in the account.

(XII).—That during the continuance of the mortgage and after the redemption of the mortgaged property, I and my representatives shall have no claim to any income, profits or damages of any description against the mortgagee or his representatives.

On November 4, 1886, the mortgagor paid Rs. 2,699-8-0 on account of principal and from April 4, 1886, to May 29, 1892, he paid various sums amounting to Rs. 13,461 on account of interest.

On September 15, 1892, the mortgagee sued the mortgagor, who had failed to pay the instalments of interest in accordance with the terms of the mortgage-deed, for possession of the mortgaged property. On September 18, 1893, his claim was decreed with costs amounting to Rs. 1765-2-0 by the District Judge of Fyzabad and on January 27, 1894, the mortgagee obtained

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possession of the mortgaged property. The following were the issues fixed in that suit :—

" 1. Is the account filed by the plaintiff correct ?

" 2. If not, what sum is due to plaintiff, or rather what sum is due to plaintiff under the mortgage-deed ? "

The judgment of the District Judge of Fyzabad ran as follows :—

" CLAIM.—For possession of the property mortgaged, specified in the margin, entire village Ilyaspur and half of the shares in villages Husainabad, Patti Yakub and Karmemau, and of 6 annas share in village Olhepur, Pargana and Tahsil Haidergarh, District Bara Banki, or for Rs. 33,088-13-3½ principal Rs. 26,300-8 and interest Rs. 6,788-5-3½ on a bond dated 30th September 1885.

Judgment.—As to the issues fixed, the defendant agreed to accept the oath of Har Parshad. Har Parshad has taken the oath adversely to defendant, so the accounts are filed by plaintiff (*i.e.*, as corrected by the Commissioner) must be regarded as accurate.

As plaintiff sues for possession, I give a decree for possession of the mortgaged property as claimed. There is no necessity for passing any order as to the amount due under the mortgage to plaintiff, beyond saying that the account filed by plaintiff after the correction reported by the Commissioner is correct.

Decree for possession of property in suit in favour of plaintiff with costs."

On June 11, 1894 the same District Judge dismissed, with costs amounting to Rs. 201-6-0, an application for *review of judgment* which had been filed by the mortgagor.

The mortgagor on December 21, 1899 sold the village of Ilyaspur to the appellant, who on June 5, 1900, tendered a sum of Rs. 37,000 to the mortgagee in redemption of the mortgage. The tender was refused.

On June 12, 1900, the mortgagor and the appellant instituted against the respondent the present suit in the Court of the Subordinate Judge of Bara Banki for redemption on payment of Rs. 27,289-1-5, in accordance with accounts annexed to the plaint.

In defence the respondent filed a written statement. He did not deny the right to redeem, but claimed that he was entitled to receive on redemption over Rs. 50,000. The points in dispute are sufficiently indicated by the issues, which were as follows :—

I.—Has the amount due to the defendant been settled in

former suit *in re* Mirza Muhammad Abbas Ali Khan *v.* Chaudhri Imdad Ashraf?

II.—If so, is the matter *res judicata*?

III.—Is defendant entitled to (a) interest and (b) compound interest on the amount due to him on the date he obtained possession?

IV.—If so, at what rate?

V.—Has defendant cut down any trees, and if so, of what value?

VI.—Is defendant liable to be debited with such value?

VII.—Are there any, and what arrears of rent due from tenant? and is defendant entitled to the same?

VIII.—Is defendant entitled to get from the plaintiff over and above the usufruct of the mortgaged property, the amount paid by him on account of *guzara* and enhanced Government revenue?

IX.—What amount is defendant entitled to get before plaintiff can obtain redemption?

X.—Did plaintiff tender Rs. 37,000 to the defendant on the 5th June 1900, and was the tender proper and sufficient to pay off the mortgage?

XI.—If so, what is the effect of defendant's refusal to receive the amount?

On November 29, 1902 the Subordinate Judge delivered his judgment. He decided the first and second issues in favour of the plaintiffs. On the third and fourth issues he decided that on the true construction of clause 4 of the mortgage-deed compound interest was payable at the rate of 10 per centum per annum. On the fifth and sixth issues, he allowed the mortgagor a sum of Rs. 100. On the seventh, he held that Rs. 225-3-3 should be allowed to the mortgagee for arrears of rent. He decided the eighth issue in favour of the mortgagee in the following terms:—

"The *guzara* item the plaintiffs have already allowed in their abstract of accounts annexed to their plaint. This matter is not under controversy and as to the question of Government Revenue at the enhanced rate, I think the defendant is entitled to charge it on the plaintiffs. Clause 4 of the mortgage-deed supports his demand, and I answer this issue in the affirmative."

On the ninth issue, he allowed the mortgagor credit for rent on plots of land cultivated by the mortgagee. He decided the tenth and eleventh issues in favour of the plaintiffs. In the

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Court of the Judicial Commissioner at the hearing of the appeals the mortgagee admitted the fact of the tender having been made.

By his decree he ordered an account to be taken on the basis of the above findings and decreed redemption on payment of the amount determined by that account.

Both parties, thereupon, appealed to the Court of the Judicial Commissioner of Oudh, which Court heard the two appeals together and delivered judgment on February 22, 1904. It held that on the true construction of the mortgage-deed compound interest was not payable in the event of the mortgagee taking possession of the mortgaged property. Their Lordships upheld that finding and agreed with the following reasoning for the same :—

“It was contended on behalf of the plaintiffs that the expression *sud mazid munafa maskura ka* in clause 4 does not mean compound interest at all. I cannot accept this contention. The word *munafa* is used in the deed as a euphemism for interest and the literal translation of these words is “further interest of (or on) the interest.” It appears to me quite clear that if the mortgagee had not taken possession under the last part of clause 4, he would have been entitled to claim compound interest, but this clause gives the mortgagee two alternatives, he may either sue for principal, interest and compound interest and costs, etc., or take possession of the property, but he cannot do both. Upon taking possession, the rights of the mortgagor and himself are regulated by clauses (5) to (10) and as nothing is said about compound interest in any of those clauses, the mortgagee cannot claim compound interest in case the net profits fall short of the interest. The provision in clause 7 that the mortgagee may take the balance or net profit in lieu of interest seems to mean that he may take in lieu of simple interest on the amount of the principal for the time being remaining unpaid, and not as contended by the mortgagee, interest upon the principal and interest due at the time when the mortgagee took possession. The effect of clauses 7 and 10 taken together is that upon redemption, in case the net profits have been less than the simple interest payable under the deed, an account must be taken of those profits [for the period during which the mortgagee was in possession], but in case the net profits have been equal to or greater than the simple interest then no account need be taken of them for the period. In both cases

the mortgagor must upon redemption pay to the mortgagee the amount due from the tenants on account of rent or advances, the amount of any additional revenue imposed by Government on a re-settlement of the land, and any sums decreed against the property and paid by the mortgagee. The Subordinate Judge held that compound interest was payable up to the date on which the mortgagee took possession, because he did not see why the stipulation for compound interest should apply only if the mortgagee sued for his money and not if he took possession. But the answer to this view is that the mortgagee is clearly given a choice of two remedies and having elected to take possession he cannot claim the benefits of the other alternative. The terms of the contract so construed may seem rather strange, but the contract must be interpreted as it is and not according to any notion of what would have been a reasonable arrangement. The deed as it stands provides for compound interest only in the case of a suit brought by the mortgagee on the occurrence of a default in payment of interest.

Mr. Jackson on behalf of the mortgagee admitted that according to the construction of the deed, which I have adopted the interest due to the mortgagee while in possession has been recovered out of the profits and he said that an account should not be taken for that period."

It upheld the finding of the Subordinate Judge on the first and second issues relating to *res judicata* for the following reasons, which were adopted by their Lordships in upholding that finding :—

"On September 15, 1892, the mortgagee brought a suit against the mortgagor alleging that there was then due to him a sum of Rs. 33,087-13-3½ and praying for a decree for possession of the property or in the alternative for recovery of that sum with further interest. A Commissioner appointed to make up the accounts reported that Rs. 33,087-9-8½ were due to the mortgagee at the date of the suit. The Court in giving judgment held that there was no necessity for passing any order as to the amount due under the mortgage beyond saying that the account was correct and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It is contended by the mortgagee in the present suit that the decree in the previous suit must be accepted as settling the amount due to

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the mortgagee on September 15, 1892. It has often been held that when a mortgagee sues for possession as mortgagee, the Court should not determine the amount then due, but should leave the accounts to be settled when the mortgagee sues for sale or foreclosure or the mortgagor sues for redemption. It appears to me quite clear that the Court did not in the suit brought by the mortgagee decide the question of the amount due to the mortgagee. It expressly refrained from doing so. It may be that the mortgagor did not in that suit dispute the right of the mortgagee to compound interest, but nothing has occurred to raise an estoppel against him and therefore he may now show if he can that under the terms of the deed compound interest is not payable."

The finding of the Subordinate Judge as to the value of the trees was accepted; and it was not disputed that rent for land cultivated by the mortgagee was properly allowed. The mortgagee was also allowed credit for the amount paid by him for maintenance, for enhanced Government revenue and for mutation of names, and also for the costs of the previous suit. An order was made remanding the case to the Court of the Subordinate Judge to report "what amount was due to the mortgagee on the date of the tender, and if the amount tendered was insufficient, [what amount would be due to the mortgagee on the 15th June, 1904,] and if the amount tendered was sufficient, and the plaintiffs so desired, what amount was due to the mortgagee after debiting him with the gross profits for the period subsequent to the tender."

On April 7, 1904 the Subordinate Judge returned his finding. He decided that the tender was insufficient and that on the 5th January, 1904, the sum due to the mortgagee was Rs. 41,040-6-3, and in addition the arrears due from tenants, the amount of which could not be ascertained, and that the same amount would be due to the mortgagee on the 15th June, 1904. The following were his reasons, with which their Lordships agreed, for his finding, which was upheld by their Lordships, in connection with arrears of rent, whether statute-barred or otherwise, due to the mortgagor:

It is admitted on behalf of the parties that the mortgagee did not advance any money as *takavi*. It was further admitted that at the end of 1307 Fasli the amount due from the tenants on account of arrears of rent was Rs. 301-2-9, out of which the recovery of Rs. 190-3 was barred by limitation, while the recovery of the remaining sum of Rs. 110-5-9 was not so barred.

It was contended on behalf of the plaintiffs that the mortgagee could get Rs. 110-5-9 only.

The 10th provision of the mortgage-deed runs thus :—

“When in the Jeith fallow season whether within the specified term or after it has expired, I pay to the said mortgagee the whole principal and interest with the revenue and amounts due from the tenants on account of advances or arrears of rent and other expenses according to the terms of this deed, without legal objection as to limitation, &c., (*bila uzr a qanooni hadde samaet waghaira ke*), then I shall be entitled to redeem the mortgaged property. I am, therefore, of opinion that the mortgagee is entitled to get the money due to him from the tenants on account of arrears of rent, whether its recovery is barred by limitation or not.”

In the meantime both parties had applied to the Court of the Judicial Commissioner of Oudh for a review of judgment. The following is taken from the order of the Court passed on the plaintiffs' application :

“The first, second and third paragraphs of the application refer to the costs decreed to the mortgagee in the previous suit. We held that the amount of those costs should be taken into consideration in calculating the amount due to the mortgagee. It is said that the mortgagee did not claim those costs in the present suit and the reason may be, as the applicants allege, that the mortgagee has taken out execution of the decree which he obtained.

“In writing the judgment, I certainly omitted to notice this. I would admit this application as regards the costs in question.

“The fourth, fifth and sixth paragraphs of the application challenge our decision that the mortgagee is entitled to receive from the mortgagor the amount paid by him on account of enhanced revenue, and the amounts paid on account of maintenance. It is contended that this question was not raised at the hearing, but our notes show that it was raised. Mr. Jackson on behalf of the mortgagee distinctly urged that his client was entitled to those sums. For the applicants it is urged that the seventh clause of the deed has not been correctly translated in the judgment. The clause was not translated as literally as it might have been. It might be translated thus :—“In case he takes possession of the mortgaged property, the mortgagee may after paying the Government revenue and other sums assessed by Government, which may hereafter be assessed or fixed by Government.

: “It is said that the words “which may hereafter be assessed

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or fixed by Government" refer to additional revenue which might be assessed, but the construction of the sentence, shows that this is not the meaning, and clause 9 of the deed supports this construction, because it provides that an enhancement of the revenue at a resettlement and a consequent shrinkage of the profits shall give the mortgagee a cause of action. Taking the various clauses of the deed together, I think there can be no doubt that the intention was that the mortgagee should be entitled to be paid the amount of any enhancement of the revenue. A provision that a mortgagee may after defraying certain expenses take the profits remaining in lieu of the interest even if they exceed the interest, and that the mortgagor shall pay unexpected charges such as enhancements of revenue is commonly found in mortgage-deeds and the validity of such a provision has never been challenged.

"As regards the sum paid on account of maintenance, the position is still clearer. It cannot have been intended that the mortgagee should pay these sums out of the profits and have no rights to recover them from the mortgagor. Indeed Mr. Lincoln, who appeared for the applicants, was unable to point to anything in the deed to justify his contention except the word "*waghaira*" in clause 7. The fourth, fifth and sixth paragraphs of the application for revision are merely an attempt to re-open a question argued and decided at the hearing of the appeal.

"In my opinion except in regard to the costs of the previous suit no sufficient ground has been established for a review of the judgment of this Court. As regards those costs, I would admit the application and direct that notice be issued to the mortgagee Muhammad Abbas Ali Khan.

"The date fixed for the hearing should be the same as that fixed for the disposal of the appeal after the findings of the Court below have been received."

The two appeals were finally disposed of on July 27, 1904. The mortgagee was not allowed credit for costs of the previous suit, nor for the cost of the office as well. He was allowed credit for arrears of rent, whether barred by limitation or not. In the result, two decrees were made in the two appeals, which directed redemption on payment of Rs. 39, 871-6-3. The judgment contained the following :—

"The question of the costs incurred by the mortgagee in the previous suit must now be decided. Mr. Jackson on behalf of the mortgagee contends that the costs of the previous suit were

properly incurred by his client in enforcing his security, and he has referred to some English authorities which seem to show that in England the mortgagee would certainly be entitled to add such a sum to the mortgage-money. There seems to be no Indian authority on the question. Section 92 of the Transfer of Property Act provides only for the taking of an account of the mortgage-money, and of the costs of the suit for redemption. The mortgage-deed does not provide that the mortgagee may add to the mortgage-money the costs of the suit for possession brought under clause 4 of the deed. These costs were claimed by the mortgagee in his written statement, but the claim does not seem to have been pressed in the Court below. It was not put forward in the memorandum of appeal, and it was not mentioned in the course of the argument in this Court.

"Upon further consideration, I think that the costs of the previous suit should not be allowed. The law does not provide for them, nor does the contract between the parties; and as a matter of fact the mortgagee endeavoured to realize those costs in execution of the decree which he obtained. As regards these costs then I think that the application for review should be allowed. * On behalf of the mortgagor it is contended that the Subordinate Judge in ascertaining the amount due at the date of the tender was wrong in taking into account arrears of rent the recovery of which was barred by limitation at the date of the tender. But in my opinion the tenth clause of the deed is perfectly clear. It provides that the mortgagor shall upon redemption pay amongst other items the amounts due from tenants on account of advances [takavi] or arrears of rent, whether recovery of such amounts is barred by limitation or not. I cannot accept the argument that this provision applies only to sums claimed on account of enhancements of revenue and other expenses [ikhrajat]; no question of limitation could arise as to them, whereas a question of limitation might arise and in fact has arisen with regard to the arrears of rent. Therefore, in my opinion in considering whether the sum tendered on June 5, 1900, was or was not sufficient, the whole amount then due from tenants on account of rent or advances, namely, Rs. 301-2-9, should be allowed."

The appellant, thereupon, preferred two appeals, which were consolidated, to His Majesty in Council. The respondent, on the other hand, filed a cross-appeal by special leave of His Majesty in Council for the following "reasons":—

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1. Because the amount due to the mortgagee was determined in the previous suits, and the parties are bound by the finding of the Court on that question.

2. Because the respondent is entitled to compound interest after the date up to which the interest and the compound interest were included in the account taken in the previous suit.

3. Because, owing to the non-production of the original sale-deed executed by the mortgagor in favor of the plaintiff, the suit of the plaintiff should have been dismissed.

4. Because the costs of the previous suit should have been added to the amount awarded to the defendant in the present suit, with interest thereon.

5. Because the respondent is entitled, (a) to interest on the costs of the mutation proceedings, (b) the costs of preparation of the well and the thana with interest thereon, (c) interest on the amount paid on account of maintenance and the enhanced revenue.

Mr. DeGruyther for the Appellant, at the outset referred to the Transfer of Property Act (IV of 1882), Secs. 83 and 76 (1) and to clauses 10, 4 & 2 of the mortgage-deed and contended that the mortgagee had no right to compound interest. The Subordinate Judge found that compound interest was due up to the date of possession but not later. That finding was not right, because the mortgagee had got the option of charging compound interest or taking possession. He exercised that option and preferred to take possession. He could not, therefore, have compound interest. The decision of the Judicial Commissioner on that point was right.

As to costs of the previous suit there was no provision in the deed itself for that. That point was not open to the mortgagee, who, after claiming those costs in his written statement, did not press that claim before the Subordinate Judge. He did not put that claim in the memorandum of appeal to the lower appellate Court and did not mention it in the course of the argument before that Court, whose finding, it was submitted, was right.

The mortgagor was not liable to be charged for the enhanced Government revenue, which was provided for in the deed, unless the profits were less than the interest payable to the mortgagee. That sum was wrongly charged. The charge for maintenance could not be made under clause 7 of the mortgage-deed. The Courts were wrong on that point.

After referring to Sec. 72 of the Transfer of Property Act, it was submitted that the mortgagee was not entitled to arrears

of rent, the recovery of which was barred by limitation. The mortgagee was not entitled to credit for the whole of the profits of the mortgaged property as interest on a portion only of the mortgage-debt. The appellant was, on the taking of account, entitled to interest on payments made by him in discharge of the principal. On the true construction of the mortgage-deed and a true account, the amount due to the mortgagee on June 5, 1904 did not exceed Rs. 37,000.

[SIR ARTHUR WILSON :—The tender has no effect except on interest.]

Mr. DeGruyther.—The tender made on that date being sufficient the appellant was entitled to the gross profits from June 5, 1904.

Mr. Ross for the Respondent :—The concurrent finding of the lower Courts that the tender, made by the mortgagor to the mortgagee, was not sufficient to pay off the amount due to the mortgagee was right.

As to maintenance charge, the lower Courts concurred in allowing that to the mortgagee, and it was submitted that they were right. The Subordinate Judge said in his judgment that the maintenance item was not disputed before him. In the grounds of appeal to the lower appellate Court, no exception was taken to that remark and the item was not pressed before that Court on the hearing of the appeal. That point was not open to the appellant at that stage of the case.

Both Courts in India were right in charging the mortgagor for the enhanced Government revenue. The mortgagee was entitled to all arrears of rent, whether statute-barred or otherwise. It was a matter of construction of the deed, and the Courts below had rightly decided that in favour of the mortgagee.

After referring to Sec. 13 of the Civil Procedure Code and the issues fixed in the mortgagee's suit for possession in 1892, it was contended that the amount due to the mortgagee at the time of the institution of that suit was determined in the previous suit and the parties were bound by the finding of the Court in that suit.

[LORD COLLINS :—Where is the account ?]

Mr. Ross :—Not on record, my Lord. But one of the issues was : "Is the account filed by the plaintiff correct ?" The Court held that "the account filed by the plaintiff after the correction reported by the Commissioner is correct." The Civil Procedure Code expressly says "issue," and question of accounts was an issue in that suit. It was submitted that in the account then

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found, compound interest was allowed, the correctness of which could not be questioned now. The respondent was entitled to compound interest after the date of that account. The mortgagee was entitled to recover the costs of previous suits under section 72 of the Transfer of Property Act and also under the mortgage-deed, clause 4 of which refers to taking possession, an act which would entail costs. The costs in dispute were incurred in the suit brought for taking possession. The respondent was entitled under section 72 of the Transfer of Property Act to recover what he claims under the 5th 'reason' of his cross-appeal.

Mr. DeGruyther, in reply, after referring to sections 9 and 11 of the Indian Evidence Act (I of 1872) contended that there was no evidence on record to show what was the precise conclusion in the previous suit. The judgment in that case says, "there is no necessity for passing any order as to the amount due under the mortgage" to the mortgagee. There was no finding as to the amount then due to the mortgagee and consequently the question was not *res-judicata* as contended. As to the statute-barred arrears of rent, clause 10 of the mortgage-deed could not mean that the mortgagee could sue third persons for arrears. The mortgagor simply undertook not to raise the question of limitation but he could not give any undertaking on the part of third persons. The respondents' claims under the 5th "reason" of his cross-appeal did not fall under section 72 of the Transfer of Property Act.

The judgment of their Lordships was delivered by

Lord Collins.—These are consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh. The principal appellant obtained leave to appeal in India in the usual way. The cross-appellant obtained from His Majesty in Council special leave to appeal.

The questions in these appeals turn upon the construction of a deed of mortgage and relate to the terms upon which the mortgagor was entitled to redeem. The mortgage was executed by one Chaudhri Imdad Ashraf in favour of the respondent on 30th September 1885. The material parts of the deed are set out in the record and are abstracted in the judgments below, and need not be here repeated. The mortgage-money was Rs. 29,000, and the rate of interest 10 per cent. per annum. By the 15th September 1902, the mortgagor had paid in all Rs. 13,461 on account of interest. On the 4th of November, 1886, he paid Rs. 2,699 on account of principal. Afterwards he made default in pay-

ing interest, and the mortgagee instituted a suit for possession, and on 18th September 1893, got a decree under which he was put in possession on the 27th January 1894. The mortgagor on 21st December 1899 sold a portion of the mortgaged property to the appellant, Chaudhri Muhammad Naseem, who, on the 5th June 1900, tendered to the mortgagee a sum of Rs. 37,000 in redemption of the mortgage. The tender was refused, and this suit for redemption was instituted by the appellant and the mortgagor. One of the chief matters in controversy was whether compound interest was in the circumstances payable by the mortgagor. This point was decided by the Subordinate Judge in favour of the mortgagee, but on appeal, the Judicial Commissioners took a different view and disallowed it. There were also other items in the account as to which disputes arose which were decided by both Courts in favour of the mortgagee. The result was that on an account taken on the basis of the interpretation and findings adopted by the Judicial Commissioners, it appeared that the sum of Rs. 37,000, which on the 5th June 1900, had been tendered by the mortgagor and refused by the mortgagee as the sum payable to entitle the former to redeem, was less than the true amount as ascertained by the judgment of the Judicial Commissioners by about Rs. 200. Against this decision both sides have appealed, after having first been heard on motions to vary in certain respects the terms of the decrees. Naturally, on the hearing of the appeals before this Board, each side tried to vary the account in his favour by attacking particular items so as to establish or destroy the sufficiency of the tender.

A number of these controverted items had involved inquiry into the facts in the Court of first instance, and were accordingly reported upon by a Commissioner appointed by the Subordinate Judge, who made the report the basis of his decision. It is, of course, impossible for this Board to review findings of fact on such materials, nor were they invited to do so but it will be found that the real controversy narrows itself down to some two or three questions of principle, which have been discussed and decided in the Courts below. These questions would appear to be :

1. On the true construction of the agreement, is the mortgagor liable for compound interest since the mortgagee entered into possession of the mortgaged premises ?
2. Is the mortgagee entitled to get from the mortgagor over and above the usufruct of the mortgaged property, the amount paid by him on account of maintenance and enhanced Government revenue ?

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3. Is the mortgagee entitled against the mortgagor to arrears of rent due from tenants even where such arrears are statute-barred as against the tenants?

4. Is the mortgagee entitled to credit for the whole of the profits during the period, when, in consequence of part payment, the whole debt was no longer due?

5. Is the mortgagor entitled, on the taking of accounts, to interest on payments made by him in discharge of the principal?

Their Lordships will consider these points in their order:

First, as to compound interest. This turns upon the construction of clause 4 of the agreement. On this point their Lordships agree with the reasoning and interpretation of the Judicial Commissioners.

Secondly, as to maintenance and enhanced revenue, even if the point as to maintenance is still open to the mortgagor, which is doubtful, their Lordships adopt the construction of the agreement on these points in which both the Courts below concurred.

Thirdly, as to statute-barred rent, their Lordships agree that this point, as held by the Subordinate Judge, is met by the express language of the 10th clause of the mortgage-deed.

Points 4 and 5 were not taken by the mortgagor either before the Subordinate Judge or the Judicial Commissioners, and are not now open to the mortgagors, neither is there anything to be found in the agreement to support them.

With regard to the "reasons" put by the mortgagee for his cross-appeal to His Majesty in Council, their Lordships adopt the conclusions and reasons of the Court below on the 1st, 3rd, and 4th of those "reasons." The 2nd reason raises the question of compound interest, which has already been dealt with. The fifth is not open to the mortgagee; the fact that he abstained from taking it is made the subject of comment by the Commissioners.

The result is, that in the opinion of their Lordships, the appeals and the cross-appeal all fail, and they will, therefore, humbly advise His Majesty that they should be dismissed.

The costs of the appeals will be borne by the respective appellants.

Messrs Barrow, Rogers and Nevil.—Solicitors for Md. Naseem.

Messrs Young, Jackson, Beard and King.—Solicitors for Mirza Muhammad Abbas Ali Khan.

J. M. P.

Appeal and cross-appeal dismissed.



The Hon. Mr. Justice H. L. Stephen.

The Indian Art School,
CALCUTTA.

PRIVATE AND PUBLIC

THE STATE OF NEW YORK
IN SENATE,
January 1, 1914.

REPORT OF THE

COMMISSIONER OF THE LAND OFFICE

FOR THE YEAR 1913.

ALBANY: J. B. LEECH, 1914.

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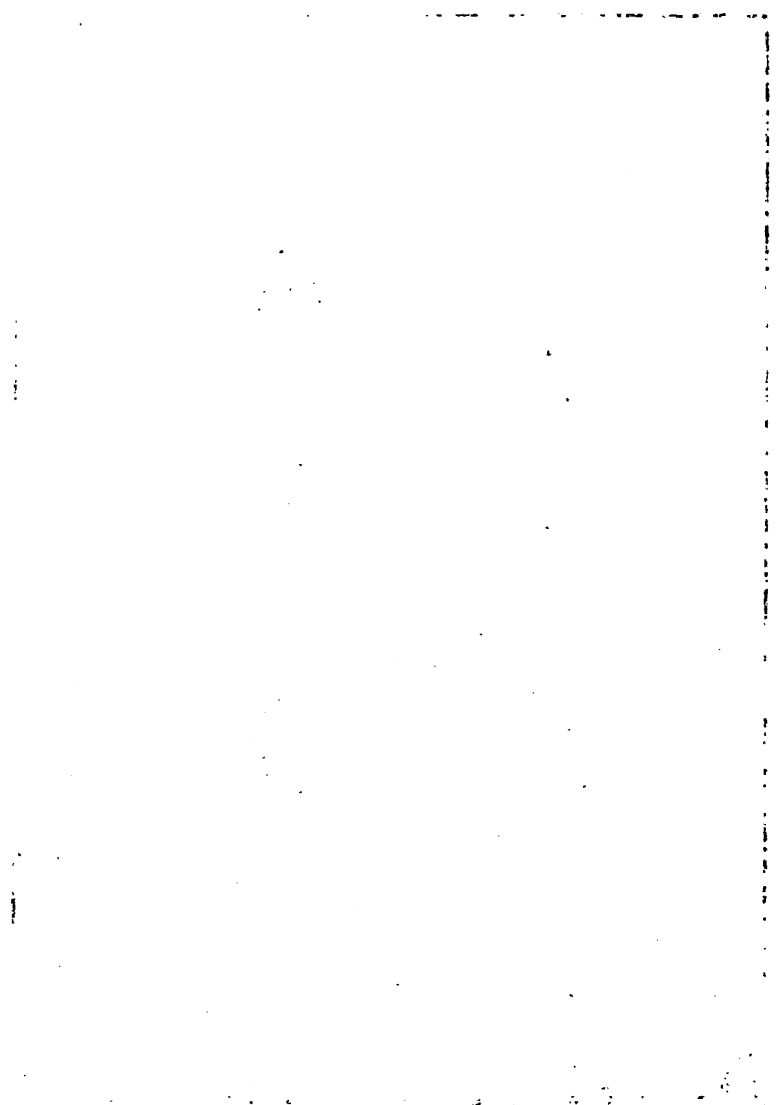
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C. L. S. S.

PRIVY COUNCIL.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

RAJA GOKULDAS AND OTHERS

v.

SHETH GHASIRAM.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
CENTRAL PROVINCES.]

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November, 4, 19.

Decree upon a mortgage—Construction—Future interest to date fixed for payment.

When a decree directed payment of mortgage money and cost of the suit with future interest to the date fixed for payment :

Held, that the decree-holder was entitled to interest until realization.*Maharajah of Bharatpur v. Rani Kunno Dei* (1) and *Rani Sundar Koor v. Rai Sham Krishen* (2) followed.

Appeal from a decree of the above mentioned Court (July 30, 1904) reversing a decree of the Court of the Civil Judge, Narsinghpur (November 4, 1903).

On September 18, 1896 the appellants in their suit (No. 57 of 1896) against the respondent in the Court of the Civil Judge of Jubbulpore obtained a conditional decree for sale of certain mortgaged properties under sections 86 and 88 of the Transfer of Property Act (IV of 1882) in terms following :—

"It is hereby ordered that the defendant is indebted to the plaintiffs in the sum of Rs. 20,457-4" for principal and interest on the mortgage mentioned in the plaint, and in the further sum of Rs. 1,106-10 for costs and that upon the defendant paying to the plaintiffs or into the Court, the amount so due with future interest at 7 per cent. per mensem from the date of the suit, *viz.*, 22nd July 1896 on or before the 18th day of March 1897, the plaintiffs shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall transfer the property to the defendant free from all incumbrances created by the plaintiffs or any person claiming under him or under whom he claims, and shall if necessary put the defendant in possession of the property; but that if the payment is not made on or before the said 18th day of March 1897, the mortgaged property as detailed below or a sufficient part thereof shall be sold, and the proceeds of the sale (after paying thereout expenses of the sale) paid into Court, and applied in payment of what is due to the plaintiffs, and the balance, if any, paid to the defendant, or other persons entitled to receive the same. If the decree is not satisfied from the sale proceeds, the balance will be recoverable from the defendant's person and other property."

... (1) (1900) L. R. 28 I. A. 35.

(2) (1906) L. R. 34 I. A. 9.

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The respondent did not pay the amount under that conditional decree which was made absolute on June 25, 1898 in the following terms :—

"Whereas it appears to the Court that the defendant in this suit has not paid into Court or to the plaintiffs the sum of Rs. 20,457-4-0 and 1106-10 and interest at 7 as. per cent. per mensem from July 22, 1896, which by the conditional decree passed by this Court on September 18, 1896, he was required to pay on or before the 18th of March 1897, it is hereby ordered that the mortgaged property as detailed below be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is due to the plaintiffs and that the balance, if any, be paid to the defendant or other persons entitled to receive the same."

That decree was on July 13, 1898 transferred to the Narsinghpur District for execution. The transfer order certified that on July 12, 1898, there was due to the appellants, after deducting Rs. 5,000 paid, the sum of Rs. 18,322-7-6. On September 21, 1898, the appellants took out execution and claimed Rs. 18,484-1.

On September 22, 1898, the then Civil Judge of Narsinghpur ordered that Form C. be submitted to the Collector for sale of some of the mortgaged properties, and the case was struck off.

On August 12, 1899, the appellants for a second time applied for execution and claimed Rs. 19,279-4-9. Form C. was again ordered to be sent to the Collector and the case was again struck off the file.

On April 6, 1901, the appellants made a further attempt to execute the decree, claiming Rs. 20,719-2-3. Form C was sent to the Collector as the same did not appear to have been sent to him as ordered in 1898 and the case was struck off.

On August 24, 1903, the respondent made an application to the Court of the Civil Judge of Narsinghpur complaining that the appellants had wrongly calculated future interest on the decretal amount from the date of the suit to the date of execution. It was urged that in the absolute decree there was no order to pay future interest, and that under the conditional decree, the appellants were entitled to future interest only up to the date which was fixed for payment by the Court, *viz.*, March 18, 1897.

An account of the amount due was given, and it was contended that only Rs. 11,581-14-0 was due under the decree to the appellants.

The appellants in their reply, however, contended, *inter alia* that they were entitled to future interest at 7 annas per cent.

per mensem, up to realization of the debt. Among the points raised for the determination of the Court was : (a) What is meant by the expression future interest ? (b) Cannot plaintiffs get interest beyond 18th March, 1897 ?

The Civil Judge delivered his judgment on November 4, 1903 and held that the appellants, decree-holders, were entitled to interest at 7 annas per cent. per mensem from the date of the suit to realization. The material part of the Civil Judge's judgment is as follows :—

"Future interest" clearly means interest payable after the decree. The decree passed under section 88, Transfer of Property Act, is the real decree in this case. "It clearly awards future interest from the date of the suit. It does not say that this future interest is to be paid up to the date fixed for payment of the decretal amount, i.e., 18-3-1887 (1897) or up to realization; but as laid down by the Full Bench ruling of the Allahabad High Court in I. L. R. 21, Allahabad, p 361, and by their Lordships of the Privy Council in I. L. R. 26, Calcutta, 39, and I. L. R. 23 Allahabad, 181, there is nothing either in the decree, or in law which would present the decree-holders from getting interest at 7 annas per cent. per mensem from the date of the suit to the date of realization."

"Upon principle and apart from authority, statutory or otherwise, it is difficult to see why the mortgagee should not have interest on his money so long as the debt remains unpaid. The 18th March, 1897 is only named in the decree as the date on which payment is to be made, and after which if payment is not made, the property is to be sold."

"It is not named with any special reference to interest. In the absence of any express direction as to the date up to which interest is to be paid, the decree is rather ambiguous on this point. The Allahabad High Court has held "that a Court executing a decree, the terms of which are ambiguous should, where it is possible, put such a construction on the decree as would make it in accordance with law."

"Formerly there was a conflict of opinion on the interpretation of sections 86, 88, 89, Transfer of Property Act, read with sections 90, 94, 97, of the same Act and with section 209 and Forms 109, and 128 of the 4th Schedule of the Civil Procedure Code, but since the decision of the Privy Council in I. L. R. 26, Calcutta 39, the point has been settled and it has been held that the Court has power in a decree under section 88 of the Transfer of Property Act to award interest subsequent to the decree and the date fixed for payment, until realization. To be in conformity with these sections as interpreted by the Privy Council, the decree must be construed as awarding interest not merely until 18th March 1897, but until realization of the mortgage money.

"If future interest is awarded under section 88, Transfer of Property Act, it is not necessary that specific mention of it should be contained in the order absolute for sale; see I. L. R. 16, Allahabad, 270; Dr. Rash Behary Ghose on Mortgage, page 897, under section 88."

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From that decree the respondent appealed to the Court of the Divisional Judge, Nerbudda Division, but the appeal was transferred to the Court of the Judicial Commissioner, Central Provinces. The Additional Judicial Commissioner, who heard the appeal holding that upon a proper construction of the decree as framed, no interest after 18th March, 1907, ran on the decretal sum, or any part thereof. The judgment, after a lengthy review of decisions on sections 86 and 88 of the Transfer of Property Act, continues as follows :—

“I need not, however, pursue this discussion further, because even if I adopt the dictum of the Allahabad High Court in the Full Bench Case of *Bakor Sajjad v. Udit Narain Singh* (1) it cannot affect the decision of the present case, because, as I read the decree before me, there is no ambiguity whatever. (Here the material part of the conditional decree is set out).

“The decree was drawn up by the late Mr. Madhub Chander Banerji, one of the best, because one of the most careful of Civil Judges who have yet sat on the Bench in the Central Provinces. In the record before me I find several instances of this Judge's minute attention to detail in the discharge of his judicial work, and I should find it impossible to believe that in decreeing future interest he should have left the period for it ambiguous in his decree. But it seems to me clear from the position of the passage directing its payment that it was introduced as an item for making up the amount which was payable on or before the 18th March 1897, to secure redemption; and that its precise figure, with respect to the 18th March 1897, was not worked out to cover the case of payment being made before that date. But there is not one word in the decree to show that the Judge contemplated affairs beyond that date, and meant to give future interest after 18th March 1897. It is quite possible, indeed probable, that he did not overlook the equities of the subsequent period; but it is even more probable that he left the matter to be dealt with when the almost certain claim for extension of the period of grace should be made; for the view that extension of time can be given only in the cases of foreclosure and not in the cases of sale decrees is a much more recent interpretation of the law which has not yet been generally adopted

“Assuming that the interpretation was ambiguous, the ambiguity seems to be swept away by Mr. Banerji's own interpretation as set out in the order absolute. (Here the material part of the absolute decree is set out).

“It seems to me clear that had the future interest been intended to continue beyond 18th March 1897, it would have been made clear here. But defendant is ordered to pay what is due to the plaintiffs, and not what on the date of payment may have become due. What is due is stated in the order absolute as already shown.

“I therefore hold that upon a proper construction of the decree as

(1) (1899) I. L. R. 21 All. 361.

framed, no interest after the 18th March, 1897, runs on the decretal sum or any part thereof.

"It is immaterial that the Judge might have decreed otherwise had he foreseen the delay in realization. It is equally immaterial that executing Courts and the plaintiffs have hitherto misconstrued the decree. The decree must be construed according to its language, and if the plaintiff's legal advisers did not detect the defect in it and foresee the loss it was likely to cause, that is no reason why some other and more equitable interpretation should be put upon it. The order of the lower Court appealed against is reversed and execution of the decree must proceed upon the construction of it which is laid down in this judgment, viz, that no interest accrues on any part of the decretal sum after the 18th day of March 1897."

Appellants thereupon applied to the Court of the Judicial Commissioner for leave to appeal to his Majesty in Council. On failing to obtain such leave, they petitioned His Majesty in Council for special leave to appeal, and having obtained the same, brought the present appeal to his Majesty in Council.

Mr. Arathoon for the Appellants : The Judicial Commissioner misconstrued the decree and misunderstood and misapplied their Lordships' decision in the case of *Maharajah of Bharatpur v. Rani Kanno Dei* (1). Both on principle and authority there was no good reason why the mortgagee should not have interest on money as long as the debt remained unpaid, that is, after the date fixed for redemption viz., 18th March 1897, until realization : *Rani Sunder Koer v. Rai Sham Krishen* (2). The judgment of the Civil Judge is sound and should be maintained.

The Respondent did not appear.

The judgment of their Lordships was delivered by

Lord Robertson.—Their Lordships have examined the decisions of this Board relied by the appellants [*Maharajah of Bharatpur v. Kanno Dei* (1), *Rani Sunder Koer v. Rai Sham Krishen* (2)], and find that they fully sustain the contention of the appellants. They will, therefore, humbly advise His Majesty that the appeal ought to be allowed, the judgment of the Additional Judicial Commissioner reversed with costs and the order of the Civil Judge restored.

The respondent will pay the costs of the appeal.

Messrs. T. L. Wilson & Co. : Appellants' Solicitors.

The Respondent did not appear.

J. M. P.

Appeal allowed.

(1) (1900) L. R. 28 I. A. 35.

(2) (1906) L. R. 34 I. A. 9.

P. C

1907.

Raja Gokuldas
v.
Sheth Ghasiram.

CRIMINAL.

1907.

May, 29.

CRIMINAL REVISION.

Before Mr. Justice Stephen and Mr. Justice Coxe.

JURAKHAN SINGH

v.

KING EMPEROR.*

Indian Penal Code (Act XLV of 1860), Sec. 447—Claim of right—Explanation of Magistrate—Judgment, supplement to.

Where the accused acts on a belief of his own right, he cannot be held guilty of criminal trespass.

A Magistrate cannot supplement his judgment by his explanation to the superior Court. If there are no material findings in the judgment, the defect cannot be cured by the Magistrate's explanation.

Rule obtained by the accused person.

Case of criminal trespass.

The facts appear from the judgment.

Babus Dasarathi Sanyal and Suresh Chandra Mukerji for the Petitioner.

Mr. Douglas White (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was delivered by

Stephen J.—In this case the petitioner has been convicted of criminal trespass under section 447, Indian Penal Code, and he has obtained a Rule to show cause why that conviction should not be set aside on the ground that the Magistrate found that he acted on a belief of his own right. There is a specific finding of this fact by the Sub-divisional Magistrate, who points out that the act would come under section 430 if the accused had not had such belief. He accordingly convicts the accused under section 441, overlooking the fact that such belief would be a defence of a charge under that section also. There is no finding in the Magistrate's judgment of any of the facts necessary to constitute criminal trespass. On an application to the Sessions Judge, he refused to refer the matter to this Court, holding that though these findings do not appear in the judgment they may be gathered from the explanation submitted by the Magistrate. We do not agree with him that the findings can be discovered in the explanation, and even if they could, it is well established that the judgment cannot be supplemented in this way by the explanation.

The Rule is, therefore, made absolute and the conviction and sentence are set aside. The fine, if paid, will be refunded to the petitioner.

N. K. B.

Rule made absolute.

* Criminal Revision No. 358 of 1907 against the order of S. Husain Esq., Sub-divisional Magistrate of Banka, Bhagalpur, dated the 16th January 1907.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

DWARKA NATH MAJHI AND OTHERS

v.

THE EMPEROR.*

CRIMINAL.

1907.

December, 18.

Bengal Embankments Act (II of 1882 B.C.), Sec. 76—Erection of embankment within prohibited area—Bunds, adding to or repairing of existing bunds, if legal—Obstruction of flow of water.

Section 76 of the Bengal Embankments Act (II of 1882, B.C.) prohibits not only the construction of new *bunds* but adding to old *bunds* in a prohibited area, so as to obstruct the flow of water.

The construction of a *bund* in a prohibited area interferes with and obstructs the flow of the water and a person who so constructs a *bund* commits an offence within the meaning of section 76 of Act II of 1882 (B.C.)

Rule obtained by the accused.

Conviction for an offence under section 76 of the Bengal Embankments Act (II of 1882, B.C.) for erecting an embankment within prohibited area so as to cause obstruction to the flow of water.

The facts of the case appear from the judgment.

Babu Sasi Sekhar Bose for the Petitioner.

No one appeared for the Opposite party.

The judgment of the Court was delivered by

Rampini J.—This is a Rule calling upon the District Magistrate of Midnapur to show cause why the conviction of and sentence passed on the petitioners should not be set aside.

The charge against the petitioners was that they had built a new embankment in a certain prohibited area, that is, on an area which a Government Notification had declared must be left unoccupied for spill purposes and within which no embankments were to be erected. The embankment in question was 250 feet long and 2½ feet high. The trying Magistrate has found that there was an old embankment there before, and that the petitioners have merely added to or repaired this *bund* by throwing earth on it, and that the sub-overseers and peons both saw him do this. In these circumstances, we think that the petitioners have committed an offence within the meaning of section 76 of Act II of 1882 (B.C.), because that section prohibits not only the construction of new *bunds* but adding to old *bunds* so as to obstruct the flow of water. And this was done in a prohibited

* Criminal Revision No. 1234 of 1907 against an order of Babu A. C. Das, Sub-divisional Magistrate of Contai, dated the 27th June 1907.

CRIMINAL,

1907.

Dwarkanath Majhi
v.

The Emperor.

Rampini, J.

area which was to be left unoccupied for spill purposes. It stands to reason that if persons construct a *bund* in a prohibited area, they must interfere with and obstruct the flow of the water.

It is unnecessary, therefore, for us to interfere and we discharge this Rule.

Rule discharged.

Before Mr. Justice Caspersz and Mr. Justice Chitty.

GOPAL SHEIKH AND ANOTHER

v.

THE EMPEROR.*

CRIMINAL,

1907.

September, 27.

Criminal Procedure Code (Act V of 1898), Secs 258, 528—Recalling of prosecution witnesses for cross-examination—Accused, right to recall—Transfer to some Magistrate other than the trying Magistrate—Judgment, passed by trying Magistrate—Trial, de novo.

The accused in a criminal case has a right under section 256 of the Code of Criminal Procedure, to have the witnesses for the prosecution recalled and cross-examined after charge.

Where a Magistrate declined to give the accused such an opportunity to recall and cross-examine the witnesses for the prosecution and proceeded to judgment in the case against the accused :

Held, that the conviction should be set aside and the trial held *de novo* by some other Magistrate of competent jurisdiction.

Rule obtained by the accused-petitioners.

Conviction under section 379 of the Indian Penal Code.

The facts of the case appear from the following judgment of the lower Court :

Accused were caught almost red handed and made over to the police : this fact has been established by very reliable witnesses and complainant's statements are to an extent verified by the evidence of Sobdoo examined by the accused : so an occurrence is admitted and the only thing to decide is to find who was in possession of the land and the trees from which the fruits were plucked. At the outset I would note that the landlord under whom the accused claim (actually it is Sobdoo) the land and the trees, have been examined by the prosecution and he has proved complainant's possession ; witnesses called to prove accused's possession are men whose evidence, I cannot rely upon, for obvious reasons ; it is evident therefore that the story of the kabuliyat is a mere paper transaction and cannot help the accused. The landlord is not certainly bound by it. I feel inclined to think that the story of Sobdoo's possession is a pure myth and was set up to give the case the colour of a civil dispute. I cannot give to the defence evidence any other value

* Criminal Revision No. 1026 of 1907 against an order of Moulvi Asadazzaman Deputy Magistrate of Faridpur, dated the 24th July 1907, upheld by an order of J. F. Graham, Esq., Sessions Judge of Faridpur, dated the 1st August 1907.

than that which I have already noted above. The information was lodged at 7 a.m., and it is therefore obvious that the version of the defence cannot be correct; it is absurd to think that the accused came to the orchard so early in the morning as to pluck the fruits to be caught and to be taken over to the Thanah at 7 a.m. Thanah appears to be 2 miles from the place of occurrence and accused's house also the same distance. I have carefully considered the evidence and I am convinced that the accused were dishonestly removing the jack fruits and the subsequent story set up is only to justify their action and cannot be believed. I accordingly convict both the accused of an offence under section 379, Penal Code, and sentence them each to undergo rigorous imprisonment for 2 months under the said section.

Babus Dasarathi Sanyal and Suresh Chandra Mukherjee for the Petitioner.

No one appeared for the Opposite party.

The judgment of the Court was delivered by

Caspersz J.—The papers of the case in which the petitioners were convicted under section 379, Indian Penal Code, were called for by this Court, and on a perusal of these papers, we issued a Rule on the 11th instant on the District Magistrate to show cause why the witnesses for the prosecution should not be recalled and cross-examined for the defence as provided by section 256, Code of Criminal Procedure, and also why the trial should not be held *de novo* by some other Magistrate of competent jurisdiction, on the ground that the Deputy Magistrate had already proceeded to judgment in the case against the petitioners.

The Deputy Magistrate has nothing further to add; and according to the view we adopted when this Rule was issued, and on the plain wording of section 256, Code of Criminal Procedure, we must make the Rule absolute on both the grounds.

The convictions and sentences passed on the petitioners are set aside and they will be retried by some other Magistrate of competent jurisdiction to be named by the District Magistrate of Faridpur.

Let the papers be sent down at once.

B. M.

Rule made absolute.

CRIMINAL.

1907.

Gopal Sheikh

v.
The Emperor.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

PRABHAT CHANDRA CHOWDHURI

v.

THE EMPEROR.*

CRIMINAL.

1907.

December, 17.

Indian Arms Act (XI of 1878), Sec. 19 (f).—Possession of a gun without license—Possession, meaning of—Possession, temporary, if possession within the meaning of the Act.

The mere possession of a gun is not punishable under the provisions of section 19 (f) of the Indian Arms Act; it is possession, contrary to the provisions of section 14 of the Act, that is punishable.

The temporary possession of a gun is not the possession contemplated by section 14 of the Act.

Rule obtained by the accused.

Conviction under section 19 (f) of the Indian Arms Act for the offence of possessing a gun without a license.

The facts of the case appear from the judgment.

Mr. P. L. Roy and Babu Baikuntha Nath Das for the Petitioner.

No one appeared for the Opposite party.

The judgment of the Court was delivered by

Rampini J.—This is a Rule, calling upon the Deputy Commissioner of Goalpara to show cause why the conviction of, and sentence passed on, the petitioner should not be set aside, on the ground that he was not in possession of the gun within the meaning of the Arms Act.

The petitioner has been convicted, under section 19 (f) of the Arms Act (XI of 1878) and sentenced to pay a fine of Rs. 5.

The facts are these: The gun used by the petitioner belongs to a gentleman named Rajendra Narain Chowdhury, who has been exempted from the operation of the Arms Act. This gentleman is now in England. His gun seems to have been left by him with his brother Jatindra Narain Chowdhury. The petitioner is a cousin of these two gentlemen. On the 30th March last a mad dog entered the compound of the *bari* of the petitioner; and he seized the gun, which was in the hands of one Rajeswar, a servant, and fired at the dog. Unfortunately he missed the animal, but a shot from the gun wounded a man named Thanda Rajbansi. For this he was convicted under

* Criminal Revision No. 1254 of 1907 against an order of Babu Harendra Kumar Ghose, Sub-divisional Magistrate of Goalpara, dated the 12th August 1907.

section 304A, Indian Penal Code, and sentenced to a fine of Rs. 300 and to detention in Court for one day. The Sessions Judge, on appeal, reduced the fine to Rs. 100.

Now the petitioner has been again prosecuted under section 19 (f) of Act XI of 1878. As regards this second prosecution, we think, in the first place, that it was unnecessary and, in the next place, that the petitioner is not liable under the provisions of section 19 (f) of the Act. The provisions of section 19 (f) do not make the mere possession of a gun punishable: they make possession, contrary to the provisions of section 14 of that Act, punishable; and we agree with the learned counsel who appears for the petitioner, that the temporary possession which the petitioner had of the gun when he snatched it up and fired it was not the possession contemplated by section 14.

We accordingly make the Rule absolute and set aside the conviction and sentence.

The fine, if paid, must be refunded.

Rule made absolute.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

SUSARMOYEE DABEE

v.

THE CORPORATION OF CALCUTTA.*

Calcutta Municipal Act (III of 1899, B.C.), Secs. 372, 383, 449 (1)—Demolition of corrugated iron shed, order directing—Building, erected without sanction—Notice, if necessary—Inconvenience or obstruction to public.

A corrugated iron shed is a "building" as defined in the Calcutta Municipal Act.

The issue of a notice under section 383 is not a condition precedent to a proceeding under section 449 (1) of the Act for the demolition of a building erected without sanction in contravention of the provisions of section 372.

Corporation of Calcutta v. Amritalal Mukherjee (1) followed.

Rule obtained by the accused Petitioner.

Proceeding under section 449 (1) of the Calcutta Municipal Act (III of 1899, B.C.) for the demolition of a building erected without sanction in contravention of the provisions of section 372 of the Act.

The facts of the case appear from the judgment of the lower Court, which is as follows:—

This is an application made to this Court by the General Committee under sections 449 and 450 of the Act for ordering the defendant

* Criminal Revision No. 1347 of 1907 against an order of Babu Amrita Lal Mukherjee, Municipal Magistrate of Calcutta, dated the 5th August 1907.

(1) (1903) 7 C. W. N. 554.

CRIMINAL.

1907.

Prabhat Chandra
Chowdhuri

v.
The Emperor.

Rampini, J.

CRIMINAL.

1907.

December, 17, 18, 20

CRIMINAL.

1907.

Susarmoyee Dabee

The Corporation of
Calcutta.

to demolish the corrugated iron shed with mat walls erected by her in front of the *Bhogeghar* (building in which food meant for offering to Kali is cooked) inside the compound of Kali's Temple without the written permission or sanction of the Chairman.

The defendant admits that she has erected the shed in question without sanction and says that the shed was erected long ago in front of her own *Bhogeghar* and that as it does not cause any inconvenience or obstruction to the public, and as it does not contravene any of the building rules, the Court should not order its demolition.

I have considered the evidence produced by both sides. I also inspected the place (at the request of the defendant) in the presence of the parties. I am of opinion that it is likely to cause inconvenience or obstruction to the public. There is ample evidence on the record to indicate that the compound of the temple is often thronged by large crowds; this is a place of public worship, the shed abuts on the narrow passage leading to the door of Kali's temple and is very close to it. The shed in question is used as a *Dala* shop where sweetmeats and other articles of offering are sold and purchased, and the customers must remain on the passage in front of the shop for sometime to purchase these articles. All these circumstances leave no doubt in my mind that the creation of the shed has caused inconvenience to the public.

The District Building Surveyor swears that the shed was built about February 1906, and that a notice was served upon the defendant under section 383 in September 1906. The defence alleges that the notice was replied to and receipt admittedly signed by a clerk in the office of the District Building Surveyor, is filed. But the District Building Surveyor swears that he did not receive any reply to the notice, and I have no reason to disbelieve him.

The shed in question appears to have been built about the beginning of 1906; the delay in the institution of the case is explained by the fact that the matter relating, as it does, to a public place of worship, was discussed at great length by the Corporation.

The building (corrugated iron shed) contravenes the provisions of section 368, in as much as its external walls are made of mats.

Under these circumstances I direct under section 409 (1) that the corrugated iron shed unlawfully constructed be demolished by the defendant who is the owner of the building within a month from the date of this order.

Babus Dasarathi Sanyal and Manmatha Nath Mukherjee for the Petitioner.

Babu Debendra Chandra Mullick for the Opposite party.

C. A. V.

The judgment of the Court was delivered by

Rampini J.—This is a Rule to show cause why an order of the Municipal Magistrate, directing the demolition of a shed

December, 20.

erected by the petitioner without the sanction of the Corporation should not be set aside.

The General Committee appears to have applied to the Municipal Magistrate under section 449 (1) for an order for the demolition of the shed, which comes within the definition of "building." The Magistrate has found that it was erected without sanction, which is indeed admitted by the petitioner. He has, therefore, passed the order complained of.

We can see no reason why the Magistrate's order is illegal. It seems to be in accordance with the provisions of sections 372 and 449 (1) of the Calcutta Municipal Act.

The learned pleader for the petitioner contends that the Corporation issued a notice to his client under section 383, that the petitioner, replied to this notice and was not given an opportunity of showing cause or of appealing to the General Committee. The learned pleader who appears for the Corporation urges that even if this be so, this would only invalidate an order directing the building to be constructed of non-inflammable materials, and that no such order has been passed. He further argues that no notice under section 383 is necessary before an order under section 449 (1) directing the demolition of the building can be passed. This would appear to be the case. Nothing in the Municipal Act has been pointed out to us which prohibits the passing of an order under section 449 (1) for the demolition of a building erected without sanction in contravention of the provisions of section 372 (2) without the precedent issue of a notice under section 383, and it has been expressly held in *Corporation of Calcutta v. Amrita Lal Mukerjee* (1) that the issue of a notice under section 383 is not a condition precedent to a proceeding under section 449 (1).

The Rule is accordingly discharged.

B. M.

Rule discharged.

(1) (1903) 7 C. W. N. 554.

CRIMINAL.

1907.

Susarmoyee Dabee
v.

The Corporation of
Calcutta.

Rampini, J.

CRIMINAL.

1907.

June, 12.

APPELLATE CRIMINAL.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

KALI SINGH AND OTHERS

v.

KING EMPEROR.*

Sessions trial—Charge to Jury—Misdirection—Statements of witnesses—Criminal Procedure Code (Act V of 1898), Sec. 164—Propriety—Judge's opinion on evidence.

In a trial by jury, the Judge ought to tell the jury that the evidence of witnesses taken under section 164 of the Criminal Procedure Code must be accepted with a great deal of caution. He ought to point out that it is not always proper for the police officer to get such statements recorded for the purpose of pinning the witnesses down to some statement, especially at a time when they are not entirely free from police influence.

It is misdirection for the Judge to say that he sees no reasons to disbelieve a particular witness. He ought to leave the question of believing or disbelieving to the jury.

In placing a suggestion made by the Crown prosecutor without any evidence to support it, before the jury, the Judge ought to point out that there is no evidence to support the suggestion.

Appeal by the accused persons.

Charges under sections 325 and 149 of the Indian Penal Code.

The necessary facts appear from the judgment.

Babu Dasarathi Sanyal for the Appellants.

Babu Srish Chandra Chowdhury (Assistant Government Pleader) for the Crown.

The judgment of the Court was as follows :

This is an appeal against a conviction under section 325 read with section 149, Indian Penal Code, by the Sessions Court at Bankipur, the jury having found that the appellants were guilty under those sections. The accused were sentenced to five years' rigorous imprisonment each.

The trial having been before a jury, the only points which are competent to be argued in this Court relate to questions of law and misdirection in the charge to the jury.

The first point put forward is that the learned Judge ought to have pointed out to the gentlemen of the jury that the evidence of some of the witnesses was tainted inasmuch as they were examined under section 164 of the Criminal Procedure Code, while there was no necessity for such examination.

* Criminal Appeal No. 362 of 1907 against the order of H. W. C. Carnuff, Esq., Sessions Judge of Patna, dated the 7th March 1907.

Section 164, Criminal Procedure Code, does not prohibit the examination of either the accused or the witnesses before an inquiry, and any Magistrate, whether he has jurisdiction or not, may record the evidence of such persons. The question, however is one of propriety. Was there any occasion for pinning down the witnesses to statements at a time when they were considerably under Police influence? There might not be any illegality; but there might be impropriety in the action in recording evidence when the witnesses were not quite free.

In *Emperor v. Nuri Seikh* (1) Prinsep and Stephen JJ. observed, "the object of section 162 of the Code of Criminal Procedure would be defeated if, while a police officer cannot himself record any statement made to him by a person under examination, he can do so by causing the person to appear before a local Magistrate not competent to deal with the case and to get the statement recorded by him. If the police officer had reasons to believe that the witnesses were likely to be gained over by the accused or his party, he should have sent in the accused and the witnesses to a Magistrate having jurisdiction without delay." The question, as we here said, is one of propriety or impropriety. The learned Sessions Judge ought to have pointed out to the jury that the evidence recorded under section 164, Code of Criminal Procedure, must have been recorded under circumstances which precluded that entire freedom of the witnesses which ought to be the foundation of a fair trial. The accused took advantage of the record of the evidence under section 164, Code of Criminal Procedure, as appears from the cross-examination of the witnesses, but still, when the matter was brought to the notice of the learned Judge, he ought to have drawn the attention of the jury to the fact that the evidence should be received with some caution.

The second point urged before us is that there are certain observations in the learned Judge's charge to the jury which go to show that he had not only made up his own mind but that he, also invited the jury to reject the suggestion made in the arguments for the defence. He says in one portion of the judgment, "several suggestions have been thrown out by the defence as regards the incredibility of the statement of Foujdar *but they are of the flimsiest character and so far as one can see, are altogether baseless.*" In a subsequent part of the charge to the jury, certain facts were pointed out which go to show that

CRIMINAL.

1907.

Kali Singh

v.

King Emperor.

(1) (1902) I. L. R. 29 Calc 483.

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Kali Singh
v.
King Emperor.

the learned Judge himself was not entirely free from doubt. He drew the attention of the jury to facts which might go to show that the witnesses were not fully reliable.

His observation as regards the evidence of Foujdar is also one which ought not to have been made to the jury. The learned Sessions Judge, in commenting on the evidence of Foujdar, seems to have unduly pressed upon the jury his own opinion that this witness was fully reliable while the others were not, and he said that, if they accepted his evidence, the accused must be convicted. He added that he saw no reason why Foujdar should have perjured himself to obtain the conviction of the accused.

In another part of the charge—and that was with reference to the statement made by the witnesses under section 164, Code of Criminal Procedure, the learned Judge refers to the case for the prosecution—a case not made out by the evidence of the witnesses. Apparently, some observations were made by the Crown prosecutor without any evidence in support of it. The words are these:—"The theory of the prosecution is that the deceased was a poor *badmash* whose death was thought nothing of by any one; that the accused are of a high caste and the maliks in a small way are connected with the maliks of the locality; that it was decided to hush the matter up, if possible, that considerable pressure has been brought to bear upon the witnesses with that object; that they found themselves between the devil and the deep sea, *i.e.*, the police and the maliks; and that the result was this confusion." Now, the learned Judge ought to have pointed out to the jury that this was the argument and that there was no evidence to support such a theory: If he had done so, the charge to the jury would have been free from objection so far as this part is concerned. We need not refer to other matters which are not of so much importance.

We have gone through portions of the evidence and we see that there is evidence on which a conviction may be based. We, therefore, set aside the conviction and sentence and, following the practice of this Court, direct a retrial by another jury.

N. K. B.

Appeal allowed; retrial ordered.

CRIMINAL REFERENCE.

Before Mr. Justice Mookerjee and Mr. Justice Cox.

*In re AZIM SHEIKH.**

Criminal Procedure Code (Act V. of 1898), Sec. 192—Transfer of case to Subordinate Magistrate—Dismissal of case against one accused—Summons against other—Cognizance of case—Jurisdiction.

Where a complaint was lodged against several accused persons and the Magistrate after examining the complainant, issued summons against one of the accused only and transferred the case for trial to a Subordinate Magistrate :

Held, that the whole case of the complainant was transferred and the Subordinate Magistrate was quite competent in discharging the accused before him, to order summons to issue for the attendance of some other accused person against whom the complaint seems to him to be well founded.

Panchanan Singh v. Umar Mahomed Sheikh (1) distinguished.

Semle : Under section 192 of the Criminal Procedure Code the whole case must be transferred.

Reference by the Sessions Judge.

Case under section 447 of the Indian Penal Code.

The facts appear from the judgment.

No one appeared in this Reference.

The judgment of the Court was as follows :

Mookerjee J.—In this case one Bacharudi complained against Sheikh Meghu, Sheikh Azim and others that they had trespassed on his land. The Sub-divisional Magistrate examined the complainant and summoned Sheikh Meghu. He passed no orders with respect to the others. Subsequently the case was transferred to an Honorary Magistrate who after taking evidence acquitted Meghu and summoned Azim to take his trial under section 447, Criminal Procedure Code. The learned Sessions Judge has referred to this Court the order summoning Azim with the recommendation that it be set aside. This recommendation is based on two grounds, namely, (1) that on the authority of *Panchanan Singh* and *Umar Mahomed Sheikh* (1), the dismissal of the case against Meghu terminated the proceedings, and (2) that the Honorary Magistrate had no power to take cognizance of the case against Azim.

In our opinion the ruling cited does not apply to the present case. In that case the Subordinate Magistrate's action was

*Reference No. 171 of 1907 made by G. C. Banerji Esq., Additional Sessions Judge of Mymensingh against the order of Babu R. K. Roy, Honorary Magistrate of Kishoreganj.

(1) (1899) 4 C. W. N. 346.

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*In re Azim Sheikh.**Modherjee, J.*

construed as indicating a desire to terminate all proceedings relating to the matter in his Court, and it was held that the District Magistrate could not interfere under section 437. In this case it is evident from the action taken by the Honorary Magistrate, that he did not desire or intend to terminate the proceedings in his Court, and this fact distinguishes the case altogether from the case cited. As the learned Sessions Judge points out, the Magistrate should not have used the words "dismiss the case", but we do not regard this expression as more than a verbal inaccuracy.

As regards the question whether the Honorary Magistrate could take cognizance of the case as against Azim, it appears that the Sub-divisional Magistrate took cognizance of the whole case examining the complainant and transferred it under section 192 to the Honorary Magistrate. The fact, that he did not summon Azim, did not amount to a dismissal of the case as against Azim, nor could it annul the cognizance which he had already taken of the case as a whole. We think that the case must be regarded as having been transferred as a whole to the Honorary Magistrate, and indeed, it appears to us open to considerable doubt whether under that section a case can be transferred piecemeal.

Accordingly we will not interfere with the order of the Honorary Magistrate. The records will be returned.

N. K. B.

Reference discharged.

APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

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August, 2, 12.

Civil Procedure Code (XIV of 1882), Sec. 13—Res judicata—Matter directly and substantially in issue—Bengal Tenancy Act (VIII of 1885), Sec. 69, applicability of—Rent, deposit of—Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 2 (a)—Onus—Notice, service of by post, presumption—Fact, question of—Order-sheet, ex parte entry in, evidentiary value of—Joint Hindu family, members of, rent due to—Co-owners, suit by some of, maintainability of—Addition of parties after limitation period—Claim joint and indivisible—Limitation Act (XV of 1877), Sec. 22—Aduabs—Batta usual, Dastur, Hazzatnama, Sonari, Selami, Percentage, and Batta Company.

The Court is not precluded under section 13 of the Civil Procedure Code from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, as it was not directly and substantially in issue in a previous litigation between the same parties where the substantial relief sought was a declaration that the appraisalment made by the Collector under section 69 of the Bengal Tenancy Act was invalid.

Section 69 of the Bengal Tenancy Act is applicable upon the assumption that the rent is taken by appraisalment or division; the only matter in controversy between the parties is as to the quantity, value or division of the produce; the section ceases to be applicable when there is a *bona fide* dispute as to the character of the holding itself.

Nakhoda Singh v. Ripu Mardan Singh (1), followed.

If a tenant relies upon clause (a) of article 2 of Schedule III of the Bengal Tenancy Act, he must prove that there was an application which fulfilled the requirements of section 61, sub-section (2) of the Bengal Tenancy Act, and that a deposit was made under section 61 after the arrear had fallen due; he must also show that notice under section 63 was served on the landlord and prove the date when the service was effected.

There is no presumption that a letter, which was posted, was properly addressed, and the presumption that the letter reached the addressee, has no application till it is established that the letter was properly addressed.

Lindenburghar v. Beal (2), *Ram Das v. The Official Liquidator* (3) and *Burmester v. Barrow* (4) referred to.

Before the presumption of due service can be applied, it is necessary to prove that the notice was sent in a cover which was properly addressed.

In re Hickly (1) referred to.

* Appeal from Appellate Decree No. 1202 of 1905, from the decision of A. W. Cook Esq., District Judge of Gaya, dated the 29th August 1905, affirming that of Babu Mahendra Nath Ghose, Munsiff of Gaya, dated the 29th September 1904.

(1) (1898) 4 C. W. N. 239.

(3) (1887) I. L. R. 9 All. 366.

(2) (1821) 6 Wheaton 104.

(4) (1852) 17 Q. B. 828; 85 B. R. 688.

(5) (1875) Ir. R. 10 Eq. 117 (127).

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The presumption that a notice sent by post was duly served is not a conclusive presumption of law ; it is merely a presumption of fact ; and whether it arises in a particular case or not, depends upon all the circumstances.

Rosenthal v. Walker (1) and *Gopal v. Krishna* (2) referred to.

Jogendra Chunder v. Dwarka Nath (3) distinguished.

An ex-parte entry in the order-sheet is by no means conclusive evidence, if it is admissible in evidence at all, as against the landlord, who was not a party to the proceedings for deposit under section 61 of the Bengal Tenancy Act.

Rowlands v. De Vecchi (4) referred to.

When rent is due to the members of a joint Hindu family, it is not open to the *karta* alone to maintain a suit for rent without joining the other members either as plaintiffs or as defendants, except when the tenant has dealt with such *karta* as sole landlord.

Kanna Pisharody v. Narayanan (5) followed.

Vithilinga v. Vithilinga (6), *Balkrishna v. The Municipality of Mahad* (7), *Rajaram v. Luchman* (8), *Kalidas v. Nathu* (9), *Balkrishna v. Moro* (10), *Guruvayya v. Dattatraya* (11) and *Khiairajmall v. Daim* (12) referred to.

When the co-owner landlords were not unwilling to join as co-plaintiffs but did so with the utmost readiness as soon as objection was taken by the tenant defendants, they should have been joined as plaintiffs in the first instance and if they are brought on the record after the expiry of the period of limitation, their claim is barred by limitation and the entire claim is barred as the claim was joint and indivisible.

Ram Kinkar v. Akhil Chandra (13), *Ram Sobuk v. Ram Lall* (14) and *Shamrathi v. Kishan* (15) referred to.

Pyari Mohun v. Kedar Nath (16) distinguished.

The *batta usual*, *Dustur*, *Hazzatana*, *Sonari*, *Okanda*, *Salami* and *percentage* are *abwabs*.

Radha Mohun v. Ganga Prosad (17), *Chakhan Sahu v. Rup Chand* (18), *Chulpan Mahton v. Tilukdari* (19), *Radha Prosad v. Bal Kower* (20), and *Millis v. Meghnath Thakur* (21) referred to.

If the tenancy was created before 1886, *batta Company* is *prima facie* not an *abwab*, but if the creation of the tenancy is of subsequent date, it is *prima facie* an *abwab*.

Rameshwar Koer v. Goburdhun Lall (22) referred to.

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| (1) (1884) 111 U. S. 185 (193). | (6) (1891) I. L. R. 15 Mad. 111. |
| (2) (1901) 3 Bom. L. R. 420. | (7) (1885) I. L. R. 10 Bom. 32. |
| (3) (1888) I. L. R. 15 Calc. 681. | (8) (1869) 12 W. R. 478 (483). |
| (4) (1883) 1 Cab. and Ell 10. | (9) (1883) I. L. R. 7 Bom. 217. |
| (5) (1881) I. L. R. 3 Mad. 234. | (10) (1896) I. L. R. 21 Bom. 154. |
| | (11) (1903) I. L. R. 28 Bom. 11. |
| (12) (1904) I. L. R. 32 I. A. 23 (35) ; 1 C. L. J. 584 ; I. L. R. 32 Calc. 296 (314) ; 7 Bom. L. R. 1. | |
| (13) (1907) 5 C. L. J. 242 (F. B.). | |
| (14) (1881) I. L. R. 6 Calc. 815 ; 8 C. L. R. 457. | |
| (15) (1907) I. L. R. 29 All. 311 ; 4 A. L. J. R. 194. | |
| (16) (1899) I. L. R. 26 Calc. 409. | |
| (17) (1843) 7 Mac. Sel. Ref. 166. | |
| (18) (1848) S. D. A. 680. | |
| (19) (1885) I. L. R. 11 Calc. 175 (F. B.). | |
| (20) (1890) I. L. R. 17 Calc. 726 (F. B.). | |
| (21) (1852) S. D. A. 4. | |
| (22) (1907) 7 C. L. J. 202. | |

Appeal by the Defendant.

Suit for rent.

The facts and arguments appear sufficiently from the judgment of the Court.

Babus Umakali Mukerjee and Luchmi Narayan Singh for the Appellant.

Mr. O'Kinealy (Advocate-General) and Moulvi Mahomed Taher for the Respondents.

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The judgment of the Court was delivered by

Mookerjee J.—This is an appeal on behalf of the tenant defendant in an action for rent commenced by the plaintiffs respondents for recovery of arrears in respect of the years 1307 to 1310. The Courts below have made a decree in favour of the plaintiffs. The principal points in controversy between the parties were three, namely, *first*, as to the character of the holding, whether it is partially *nagdi* and partially *bhowli* as alleged by the plaintiffs or, entirely *nagdi* as alleged by the defendant; *secondly*, whether any portion of the claim is barred by limitation, and *thirdly*, whether any portion of the amount claimed comes within the description of an *abwab*, which is not legally recoverable. The learned District Judge has decided all these questions in favour of the plaintiffs and his decision is challenged in this appeal, substantially, on three grounds, namely, *first*, that the question of the character of the holding is not *res judicata* but is open for investigation in the present litigation; *secondly*, that a portion of the claim is barred by limitation under Article 2, clause (b) of Schedule III of the Bengal Tenancy Act, if not, also under Article 2, clause (a) of the same schedule; and *thirdly*, that whatever is claimed in addition to the rent, comes within the description of illegal cesses or *abwabs*.

The first point taken on behalf of the appellant raises the question, whether the character of the holding is still open for investigation, or, whether the matter is concluded by the decision in an earlier litigation between the parties. It appears that, in the year 1900, the landlords respondents made an application to the Collector for appraisal of the crops of the defendant appellant. The application was made upon the assumption that the rent was payable in kind. The Collector made an order in favour of the landlords; the result was that the tenant instituted a suit to set aside the appraisal upon declaration that the

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rent was payable in cash and consequently section 69 of the Bengal Tenancy Act had no application to the tenancy. When the suit came to be heard in the Court of first instance, the parties desired that the question of the true character of the holding might be left undecided, and at their desire, the Munsiff left the question open to the parties. He held on the evidence that there was a *bona fide* dispute between the parties as to whether the lands were *nagdi* or *bhowli*, so that the Collector had no jurisdiction to make an order for appraisement, and he directed that the question as to whether the disputed lands were actually *nagdi* or *bhowli* be left open. The landlord then appealed to the District Judge and contended that the main issue as to the nature of the holding ought to be decided, specially as its decision might seriously affect the question of the *bona fides* as regards the dispute relating to the character of the holding. The learned District Judge held that the plaintiff had failed to establish that the holding was *nagdi* and that the defendants landlords had equally failed to prove that the holding was *bhowli*. In this view of the matter, he came to the conclusion that neither party had established his case, but as in his opinion, there was a *bonafide* dispute between the parties, he affirmed the decree of the Munsiff in so far as it set aside the appraisement. Upon these facts, it was contended on behalf of the landlords in the Courts below that the question of the true character of the holding is *res judicata* and the contention has been repeated in this Court. It has been argued, on the other hand, on behalf of the tenant that the doctrine of *resjudicata* does not bar the decision of the question of the character of the holding in the present litigation. In our opinion, this latter contention is well founded and must prevail. In the first place, it is reasonably clear from the proceedings in the previous suit that the question of the character of the holding was not directly and substantially in issue. The substantial relief, which the plaintiffs sought, was a declaration that the appraisement made by the Collector was invalid. He would be entitled to such declaration upon proof that there was a *bona fide* dispute between the parties as to the character of the holding; for as ruled by this Court in the case of *Nakheda Singh v. Ripu Mardan Singh* (1) where there is a *bona fide* dispute as to whether rent is payable in cash or in kind, the Collector has no jurisdiction to proceed under sections 69 and 70. Section 69 is applicable upon the

(1) (1898) 4 C. W. N. 239.

assumption that the rent is taken by appraisalment or division of the produce and the only matter in controversy between the parties is as to the quantity, value or division of the produce ; section 69 ceases to be applicable when there is a *bona fide* dispute as to the character of the holding itself. To entitle the plaintiff to succeed in the previous litigation, it was sufficient for him to establish that there was such a *bona fide* dispute, and this was the reason why both the parties agreed in the Court of first instance that the question of the true character of the holding was to be left open. The matter, therefore, cannot by any stretch of language be said to have been directly and substantially in issue between the parties in the Court of first instance. When the case went on appeal before the District Judge, he appears to have thought that the question of the character of the holding had an important bearing upon the question of the *bona fides* of the dispute between the parties. He dealt with the matter primarily from this point of view. But there is an additional reason why his finding should not be treated as *res judicata* ; even if we assume that the question was directly and substantially in issue before the District Judge, it is clear that there was no final decision. The question now in controversy between the parties is whether the rent of the holding is payable entirely in cash as the tenant alleges, or whether it is payable partly in cash and partly in kind as the landlords assert. The finding of the learned District Judge was that the then plaintiff, the tenant, had failed to prove that the holding was *nagdi* and the then defendants, the landlords, had equally failed to prove that the lands were *bhowli*. It cannot be said, therefore, that there was any final adjudication by the Court as to the true character of the disputed holding. We must, consequently, hold that the decision in the previous litigation does not operate as *res judicata* and that the view taken by the Courts below, that the matter is *res judicata* and not open for investigation, cannot be supported. The decision of the District Judge on this point must consequently be reversed and the case remitted to him in order that he may come to a conclusion regarding this point on the basis of the evidence in the record.

The second ground taken on behalf of the appellant relates to the plea of limitation. The facts so far as it is necessary to state them for the decision of this point, are briefly as follows. The rent for the year 1307 fell due on the 14th June 1900, and was deposited on the same date, the rent for the year 1308 fell

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due on the 2nd June 1901 and was deposited on the 30th May 1901; the rent for the year 1309 fell due on the 21st June 1902 and was deposited on the same date. The present suit was commenced on the 13th June 1903. Upon these facts it is contended by the learned vakil for the appellant that the claim for 1307, 1308 and 1309 is barred by limitation under Article 2, clause (a) of Schedule III of the Bengal Tenancy Act. It is further contended that the claim for 1307 is also barred under Article 2, clause (b) of the same Schedule, inasmuch as, although the suit was instituted by the first four plaintiffs on the 13th June 1903, the other plaintiffs, who are equally interested in the lands, were not made parties till the 5th of July 1903, *i. e.*, more than three years after the expiry of the year 1307, in which the rent fell due. As regards the first branch of this contention, the answer to it depends upon the construction to be placed upon article 2, clause (a) of Schedule III of the Bengal Tenancy Act, which provides that a suit for the recovery of rent, when the arrears fell due before the deposit was made under section 61 on account of the rent of the same holding, must be brought within six months from the date of the service of notice of the deposit. It is argued by the learned vakil for the appellant that, in the present case, a deposit was made by the tenant under section 61 and that notice of such deposit was served, on the landlords more than six months before the institution of the suit. In support of this allegation, the only evidence, which has been produced by the tenant, consists of extracts from the order-sheets of the Munsiff which contains recitals to the effect that an application purporting to be under section 61 of the Bengal Tenancy Act was made by the tenant, that money was deposited, and that notice was sent by post. The Courts below have declined to presume that the application had been duly made, that notice had been served, and that the service had been effected more than six months previous to the institution of the present suit. It is argued by the learned vakil for the appellant that it ought to be presumed that there was sufficient compliance with the requirements of the law on the subject, and, in support of this position, reliance is placed upon the case of *Jogendra Chunder Ghose v. Dwarka Nath Karmokar* (1). In our opinion, there is no foundation for this contention.

In the first place it is quite clear that when a defendant

(1) (1898) I. L. R. 15 Calc. 681.

asserts that a suit for the recovery of rent is barred by the special rule of limitation laid down in clause (a) of article 2 of Schedule III, the *onus* is upon him to prove that the case is covered by that clause. The claim in question provides for a short period of limitation in order that there may be a speedy decision of the points mentioned in section 61, sub-section (1) of the Bengal Tenancy Act ; by sub-section (2), the tenant has to set up a case of particular justification which the landlord, by means of a rent suit, must bring up at once for judicial determination. If, therefore, the tenant relies upon article (2), clause (a), he must prove that a deposit was made under section 61 *after* the arrear had fallen due ; he must also show that notice under section 63 was served on the landlord and prove the date when the service was effected. In the present case, there is nothing to show that an application was made under section 61 of the Bengal Tenancy Act ; it is not proved that there was an application, which complied with all the requirements of that section. No doubt, it is not necessary to prove that there was a valid deposit within the meaning of section 61, that is to say, a deposit after a previous tender or upon the happening of the other circumstances mentioned in the first sub-section to section 61 : nor is it necessary to prove that the deposit was of the full amount of money then due. But it is essential to prove that there was an application, which fulfilled the requirements of section 61, sub-section (2) ; of that, there is no proof in this case. It is next to be observed that there is no proof that the notice contemplated by section 63, sub-section (2), was served upon the landlord, nor is there anything to indicate the date on which the notice, if any, was actually served, under Chap. V paragraph 5 of the Rules framed by the Government of Bengal under section 190, sub-section 5 of the Bengal Tenancy Act ; a notice under section 63, sub-section (2) may be served by forwarding it by post in a letter registered under Part 3 of the Indian Post Office Act, 1866, or, where the Court may deem it necessary, it may be served in the manner prescribed for the service of a summons on a defendant under the Code of Civil Procedure. In the case before us, the extract from the order-sheet of the Munsiff, which has been produced, contains an entry to the effect that notice was sent by post. The learned vakil for the appellant invites us to hold that there is a necessary presumption that the notice was duly served and that it was served on a date, which is beyond six months from the date of

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the institution of the suit. In our opinion, there is no such presumption. The presumption, which is applicable to cases of this description, is thus stated in Taylor on Evidence, Vol. I, section 179 :—"The rule is well settled that, if a letter properly directed is proved to have been either put into the Post office or delivered to the postman, it is presumed from the known course of business in the Post office department, that it reached its destination at the regular time and was received by the person to whom it was addressed." [See also Wigmore on Evidence, Vol. I, section 95]. This statement is identical with the Rule as enunciated by Mr. Justice Wood in delivering the unanimous opinion of the Supreme Court of the United States in *Rosemthal v. Walker* (1). To the same effect is the proposition laid down in *Schutz v. Jordan* (2). This Rule is amply borne out by the cases of *Warren v. Warren* (3), *Woodcock v. Houldsworth* (4), *Sanderson v. Judge* (5) and *Dunlop v. Higgins* (6), and it has been adopted in this country : See *Lootf Ali Meah v. Pearee Mohun* (7), where it is stated that, if a letter is forwarded to a person by post duly registered, it must be presumed that it was tendered to him. [See also the Indian Evidence Act, section 16, III. (b) and section 114, III. (f)]. There is, however, no presumption that a letter, which was posted, was properly addressed and the presumption in question has no application till it is established that the letter was properly addressed. See *Lindenburghar v. Beal* (8), *Ram Das v. Official Liquidator* (9) and *Burmester v. Barrow* (10). Before the presumption can be applied it is necessary to prove, as was done in the case of *In re Hickly* (11), that the notice was sent in a cover which was properly addressed. In the case before us, there is no evidence whatsoever that the notice, if it was sent, was put in a cover which was correctly addressed. We may, futher, observe that the *ex-parte* entry in the order-sheet is by no means conclusive evidence, if it is admissible in evidence at all, as against the landlord, who was not a party to the proceedings for deposit under section 61 of the Bengal Tenancy Act, [*Rowland v. DeVecchi* (12)]. It is also important to remember that the presumption upon which reliance is placed is not a conclusive presumption of law ; it is merely a presumption of fact ; and whether it arises in a particular case or

(1) (1884) 111 U. S. 185 (193).

(2) (1891) 141 U. S. 213.

(3) (1834) 1 C. M. & R. 250 ; 40 R. R. 547.

(4) (1846) 16 M. & W. 124.

(5) (1795) 2 H. & Bl. 509 ; 3 R. R. 492.

(6) (1848) 1 H. L. C. 381.

(7) (1871) 16 W. R. 223.

(8) (1821) 6 Wheaton 104.

(9) (1887) 1 L. R. 9 All. 366.

(10) (1852) 17 Q. B. 828 ; 85 R. R. 693.

(11) (1875) 1 R. B. 10 Eq. 117 (127).

(12) (1883) 1 Cab. & Ell. 10.

not must depend upon all the circumstances. - See *Rosenthal v. Walker* (1), where it was observed as follows :—" The presumption so arising is not a conclusive presumption of law, but a mere inference of fact founded on the probability that the officers of the Government will do their duty in the usual course of business and when it is based upon evidence that the letters never were received, it must be weighed with all the other circumstances of the case by the Jury in determining the question whether the letters were actually received or not." See also *Henderson v. Carbondale Coal Co.* (2). A similar view was adopted by the learned Judges of the Bombay High Court in *Gopal v. Krishna* (3). As regards the case of *Jogendra Chunder Ghose v. Dwarka Nath Karmokar* (4), upon which reliance is placed, it is clearly distinguishable. In that case the notice to quit had been sent by a registered letter, the posting of which was proved and which was produced in the Court in the cover in which it was despatched, the cover containing the notice bearing an endorsement upon it purporting to be by an officer of the Post office stating the refusal of the addressee to receive the letter ; it was ruled by this Court that this was sufficient service of notice. It is obvious that nothing like what was established in that case, is made out in the case before us. On these grounds, we must hold that the tenant defendants have failed to prove that the notice under section 63 of the Bengal Tenancy Act was served on the landlords or that, if the notice was served, the service was effected on a date which is beyond six months from the date of the institution of the suit. It follows, consequently, that no portion of the claim is barred by limitation under Schedule III, Article 2, clause (a) of the Bengal Tenancy Act.

The second branch of the contention for the appellant is that, even if Schedule III, Article 2, clause (b) be applied, the claim for rent in respect of the year 1307 is barred by limitation. The facts upon which this contention is based are briefly as follows : As we have already stated, the suit was originally commenced by the first four plaintiffs ; objection was taken by the defendants that the fourth plaintiff had three brothers, who were interested as landlords and ought to join as plaintiffs ; they were thereupon brought on the record on the 5th of July 1903. Upon these facts, it is contended that, so far as these three added plaintiffs are concerned, under section 22 of the Limitation Act,

(1) (1884) 111 U. S. 185 (193).

(2) (1891) 140 U. S. 25 (36).

(3) (1901) 3 Bom. L. R. 420.

(4) (1888) 1 L. R. 15 Calc. 681.

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their claim for 1307 is barred by limitation and inasmuch as the claim for rent is joint and indivisible the entire claim for 1307 is barred by limitation. The Courts below have held that the fourth plaintiff, who is the *karta* of the family consisting of himself and his three brothers, was competent to sue on their behalf. If this is the correct view of the position of the *karta* of a joint Hindu family governed by the Mitakshara law, no question of limitation arises. We must, consequently, consider whether, when rent is due to the members of a joint Hindu family, it is open to the *karta* alone to maintain a suit for rent without joining the other members either as plaintiffs or as defendants. A similar question arose in the case of *Kanna Pisharody v. Narayan* (1). In that case it was ruled that unless where by a special provision of law, co-owners are permitted to sue through some or one of their number, all co-owners must join in a suit to recover their property. Co-owners may agree that their property shall be managed and legal proceedings conducted by some or one of their number, but they cannot invest such person or persons with a competency to sue in his own name on their behalf, or if sued, to represent them. It may indeed happen that a suit by one of several co-owners can be successfully maintained against a tenant; this is the case when the tenant has dealt with such co-owner as sole landlord and by so dealing is estopped from denying the title of the person who has let him into possession; but except in such a case all the co-owners must join as plaintiffs in the suit. This view was treated as settled law in the case of *Vithilinga v. Vithilinga* (2). A similar view has been adopted by the learned Judges of the Bombay High Court in the case of *Balkrishna v. Municipality of Mahad* (3) in which it was ruled by Sir Charles Sargent C. J., that, unless there is a special provision of the law, co-owners are not permitted to sue through some or one of their number and that all co-owners must join in a suit to recover their property; the defendant cannot be deprived of his right to insist on the other co-owners being joined on the record by the fact that they approved of the suit being brought by the plaintiff alone. This view is practically identical with what was adopted in the cases of *Rajaram Tewaree v. Luchman Pershad* (4), *Kalidas v. Nathu* (5), *Balkrishna v. Moro* (6), *Shamrathi v. Kishan Parshad* (7) and

(1) (1881) I. L. R. 3 Mad. 234.

(4) (1869) 12 W. R. 478 (483).

(2) (1891) I. L. R. 15 Mad. 111.

(5) (1883) I. L. R. 7 Bom. 217.

(3) (1885) I. L. R. 10 Bom. 32.

(6) (1896) I. L. R. 21 Bom. 154.

(7) (1907) I. L. R. 30 All. 311.

Gurivayya v. Dattatray (1), and is supported by the observations of their Lordships of the Judicial Committee in *Khiairaj-mall v. Daim* (2). In the case before us, there is nothing to indicate that the tenants accepted the fourth plaintiff as their landlord, nor is there anything to show that they are estopped from setting up the plea that he is not the sole landlord and that he must sue along with his brothers. No doubt, as was ruled by a Full Bench of this Court in the case of *Pyarimohun v. Kedar Nath* (3), if some of the co-sharers refuse to join as plaintiffs, they may be made defendants. In the present case, however, it is conclusively proved that the brothers of the fourth plaintiff were not only not unwilling to join as co-plaintiffs but did so with the utmost readiness as soon as objection was taken by the defendants. They should, therefore, have joined as plaintiffs in the first instance, and, as they were brought on the record after the expiry of the period of limitation, their claim is barred by limitation, [*Ramkinkar v. Akhil Chandra* (4)] and the entire claim for rent in respect of the year 1307, must be treated as barred upon the principle that the claim was joint and indivisible. See *Ramsebuk Kundu v. Ramlall* (5) and *Shamrathi v. Kishan* (6). We consequently, hold that the claim for the rent of 1307 is barred by limitation and must be disallowed.

The third ground upon which objection is taken, is that a portion of the claim falls within the description of *abwab* and is not recoverable. It appears from an examination of the plaint that in addition to the rent, a sum of Rs. 2 is claimed as *abwab* under the heads of *dastur*, *batta usual*, *hozzatnama*, *selami*, *chanda*, *sonari* and *percentage*, and another sum of twelve annas is claimed under the head of *batta company*. So far as the items first mentioned, are concerned, they are clearly *abwabs* and not legally recoverable; indeed, five of them have always been recognised as illegal demands. Thus the *batta usual* was held to be an *abwab* in the cases of *Radha Mohan v. Gangaprosad* (7), *Chakan Sahu v. Rupchand* (8), *Chuttan Mahto v. Tilakdhari* (9); and *Radhaprosad v. Balkowar* (10). *Dastur*, *hozzatnama* and *sonari* were held to be *abwabs* in the case of *Chuttan Mahto v. Tilakdhari Singh* (9) and *chanda* was held to be an *abwab* in *Millis v.*

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Mir Tapurak
Hosseinv.
Gopi Narayan.

Mookerjee J.

(1) (1903) I. L. R. 28 Bom. 11.

(2) (1904) L. R. 32 I. A. 23 (35); I. L. R. 32 Calc. 296.

(3) (1899) I. L. R. 16 Calc. 409

(7) (1843) 7 Mac. Sel. R. 166.

(4) (1907) 5 C. L. J. 242.

(8) (1848) S. D. A. 680.

(5) (1881) I. L. R. 6 Calc. 815.

(9) (1885) I. L. R. 11 Calc. 175.

(6) (1907) I. L. R. 29 All. 311.

(10) (1890) I. L. R. 17 Calc. 726.

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Mir Tapurah
Hossein

v.

Gopi Narayan.

Mookerjee, J.

Meghnath Thakur (1). There can be no doubt that the items *selami* and *percentage* fall within the description of *abwab* as they are arbitrary and indefinite demands in addition to the rent. All these items, therefore, must be disallowed. As regards the *batta company* it is not necessarily an *abwab* as was pointed out by this Court in the case of *Rameshar Koer v. Gobardhan Lal* (2). If the tenancy was created before 1836, *batta company* is *prima facie* not an *abwab*, but, if the creation of the tenancy is of subsequent date, *batta company* is *prima facie* an *abwab*. As the origin of the tenancy is not known in this case, before *batta company* can be allowed, the landlord must prove that it is legally recoverable.

The result, therefore, is that this appeal must be allowed; the decree of the District Judge is discharged, and the case is remanded to him in order that it may be disposed of in accordance with the directions given in this judgment. If the District Judge finds additional evidence necessary for the satisfactory determination of any particular point, he will be at liberty to proceed under section 568 of the Code of Civil Procedure. The costs of this appeal will abide the result.

A. T. M.

Appeal allowed; case remanded.

(1) (1852) S. D. A. 4.

(2) (1907) 7 C. L. J. 202.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

RADHAY KOER.

v.

AJODHYA DAS AND ANOTHER.*

CIVIL.

1907.

August, 13.

Possession, suit for—Title at the date of suit—Bengal Tenancy Act (VIII of 1885), Sec. 167—Notice, proof of service of—Notice, validity of—Order-sheet of the proceedings, entries in, evidential value of.

In a suit for recovery of possession the plaintiff can succeed only on the title as it stood on the date of the institution of the suit.

Until the notice has been properly served under section 167 of the Bengal Tenancy Act upon the incumbrancer, the incumbrance subsists.

It is obligatory on the purchaser to show that the notice under section 167 had been served in the manner prescribed. The entries in the order-sheet are not *prima facie* evidence against the incumbrancer that the notice was served.

Mir Tapurah Hossein v. Gopi Narayan (1) followed.

* Appeal from Appellate Decree No. 182 of 1906, against the decision of Babu Purna Chandra De, Subordinate Judge, Muzafferpur, dated the 25th November 1906, reversing that of Babu Suraj Mohun Das Gupta, Munsiff, Samastipur, dated the 30th June 1906.

(1) (1907) C. L. J. 251.

The purchaser who relies upon the service of notice must prove it either by the production of the person who served the notice or by any other means recognized by law; and if a question arises as to the validity of the notice, it must be shown that it was a valid notice and was signed by a competent officer as required by cl. (1) of section 167 of the Bengal Tenancy Act.

Akhoy Kumar Soor v. Bejoy Chand Mahatap (1) referred to.

Appeal by the Plaintiff.

Suit for recovery of possession and for mesne-profits.

The facts and arguments appear sufficiently from the judgment of the Court.

Babu Joy Gopal Ghosha for the Appellant.

Babu Chandra Sekhar Banerji for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—The subject matter of the litigation which has given rise to this appeal is an occupancy holding in respect of which the second defendant was a tenant under the first defendant. It is found that on the 30th August 1899, the second defendant executed an usufructuary mortgage in favour of the plaintiff and placed her in possession of the holding. On the 8th January 1904, the holding was sold in execution of a decree for rent obtained by the first defendant against the second defendant. On the 15th June 1904, the first defendant took possession and thus ousted the plaintiff. On the 7th October 1904, the plaintiff commenced this action for recovery of possession and mesne profits.

It is clear from this statement of facts which are not disputed that on the day the suit was instituted, the plaintiff had a good cause of action, inasmuch as the first defendant had wrongfully ousted her on the 15th June 1904. As soon however as the notice of the suit was served on the first defendant, he made an application to the Collector in order that the notice under section 167 of the Bengal Tenancy Act might be issued upon the plaintiff so that her incumbrance might be extinguished. In the Court of first instance, the order sheet in the proceeding under section 167 was produced, but apparently at the trial no reference was made to it by the defendant. The result was that the Munsiff held that there was nothing to show that the title of the plaintiff had been extinguished, and in this view of the matter, made a decree in her favour. The first defendant then appealed to the Subordinate Judge, and at the hearing of the appeal, produced the order sheet upon which no reliance had been placed on his

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behalf in the Court of first instance. The learned Subordinate Judge held that the entries in the order sheet afforded *prima facie* evidence that the title of the plaintiff had been extinguished. He further found on the evidence, first, that the decree for rent which was challenged as fraudulent and collusive by the plaintiff was not vitiated by fraud, and, secondly, that the mortgage of the plaintiff, the validity of which was challenged by the defendant, was genuine. He came to the conclusion, however, that as the title of the plaintiff had been extinguished after the institution of the suit, her claim must be disallowed.

The plaintiff has now appealed to this Court, and on her behalf the decision of the Subordinate Judge has been challenged substantially on two grounds, namely, *first*, that as upon the admitted facts of the case, the title of the plaintiff was subsisting and in full force at the date of the institution of the suit, she is entitled to a decree for recovery of possession and mesne profits; and *secondly*, that in any view of the matter, the extracts from the order sheet do not afford any evidence that there has been a valid service of notice under section 167 of the Bengal Tenancy Act. In our opinion, both these contentions are well founded and must prevail.

As regards the first point, it is sufficient to observe that in a case of this description, the plaintiff must succeed on the title as it stood on the date of the institution of the suit. There can be no possible controversy that till the notice under section 167 of the Bengal Tenancy Act has been properly served upon the incumbrancer, the incumbrance subsists. When, therefore, on the 15th June 1904, the first defendant dispossessed the plaintiff, his act must be taken to have been wrongful, and when on the 7th October, 1904, the plaintiff commenced this action, she was undoubtedly entitled to be restored to possession. We must consequently hold upon these facts, that the plaintiff is entitled to a decree.

As regards the second point, we must observe that the entries in the order sheet do not show, as against the plaintiff, that there has been a valid service of notice, and that her incumbrance has been extinguished. Section 167 of the Bengal Tenancy Act provides that, "a purchaser having power to annul an incumbrance under any of the foregoing sections and desiring to annul the same, may, within one year from the date of the sale or the date on which he first has notice of the incumbrance, whichever is later, present to the Collector an application in writing,

requesting him to serve on the incumbrancer a notice declaring that the incumbrance is annulled." On the application, the notice is to be issued by the Collector, and is to be served in the manner prescribed by this section. The incumbrance is to be deemed annulled from the date on which the notice is so served. The manner in which the notice is to be served is described in Chapter I, Paragraph (3) of the Rules framed by the Government of Bengal under sections 189 and 190 of the Bengal Tenancy Act. This Rule lays down that, when there is no other mode of service of notice prescribed by the Bengal Tenancy Act, or by the Rules framed by the Local Government, the service is to be effected in the manner provided for the service of summons under the Code of Civil Procedure. In the present instance, therefore, it was obligatory on the first defendant to show that the notice had been served in the manner prescribed. The production of the order sheet of the proceeding under section 167 is obviously insufficient. As was pointed out by this Court in the case of *Mir Tapurah Hossein v. Gopi Narayan* (1) the entries in the order sheet which were made *ex parte* would not be even *prima facie* evidence against the plaintiff that the notice was served. It would be necessary for the first defendant who relies upon the service of notice to prove it either by the production of the person who served the notice, or by any other means recognized by law ; and if a question arises as to the validity of the notice it must be shown that it was a valid notice and was signed by a competent officer as required by clause (1) of section 167. See *Akhoy Koomar Soor v. Bejoy Chand Mahatap* (2). It is obvious, therefore, that the materials on the record are by no means sufficient to justify the conclusion of the Subordinate Judge that there has been a service of notice on the plaintiff as required by section 167 and that the incumbrance has been duly extinguished.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge discharged and the decree of Court of first instance restored with costs in this Court and in the lower appellate Court.

This decree, however, will not prevent the first defendant from instituting an action for recovery of possession upon the allegation that subsequent to the institution of the present suit, the title of the plaintiff has been extinguished in the manner recognized by law ; what the position of the parties may be, if such an action is commenced, it is needless for us to consider.

A. T. M.

Appeal allowed ; suit dismissed.

(1) (1907) 7 C. L. J. 251.

(2) (1902) I. L. R. 29 Calc. 813.

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1907.

Radhay Koer

v.
Ajodhya Das.

Mookerjee, J.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

SRINATH PAL

v.

HARI CHARAN PAL AND OTHERS.*

CIVIL.

1907.

June, 7.

*Partnership, suit for dissolution of—Necessary parties—Party, death of—
Substitution of heirs, not made in time—Abatement of suit.*

A suit for dissolution and winding-up of a partnership involves the determination of the plaintiff's share and the taking of accounts, and the plaintiff's share could not be determined definitely without making all the parties interested in the partnership, parties to the suit, and the accounts could not be properly taken in the absence of any of them.

If on the death of one of the defendants, his heirs are not made parties to the suit by substitution in time, the whole suit is to be dismissed, even where no relief against the deceased defendant or his heirs was asked for specifically.

Ramdoyal v. Junmenjoy Coondoo (1) referred to and followed.

Suit for dissolution and winding up of a partnership.

Appeal by the Plaintiff.

The facts of the case appear from the judgment.

Babu Shib Chandra Palit for the Appellant.

Babu Baikuntha Nath Das for the Respondent.

The judgment of the Court was delivered by

Rampini J.—This is an appeal against an order of the second Subordinate Judge of Dacca, dated the 27th September, 1905.

The order is one passed under section 368 of the Code of Civil Procedure, directing that the appeal to the lower Court should abate. That appeal arose out of a suit for dissolution and winding up of a partnership. One of the defendants was the defendant No. 20; and the plaintiff in his plaint alleged that she had some interest in the property. The defendant No. 20 was accordingly made a defendant in the suit brought by the plaintiff in which the plaintiff prayed both for a declaration and determination of his share in the partnership and also for dissolution and winding up of the business.

The Munsiff found the plaintiff to be a partner, but he was not able to ascertain the extent of the plaintiff's share. He therefore disallowed the other reliefs sought for in the suit; and upon this the plaintiff appealed to the Subordinate Judge, while the defendants Nos. 1 and 2 preferred a cross-appeal. After the presentation of the appeal, the defendant No. 20 died. She died

* Appeal from Original Order No. 51 of 1906 against an order of Babu Hari Nath Roy, second Subordinate Judge of Dacca, dated the 27th September 1906.

(1) (1887) I. L. R. 14 Calc. 791.

on the 28th July 1904 and an application was not made to substitute her heirs in her stead until the 17th August 1905, that is, of course, much more than six months after the date of her death. The learned Subordinate Judge, therefore, said that the application was out of time and disallowed it; and he also found that the appellant was well aware of the death of the defendant No. 20, and that he must have submitted a false return of the notice of the appeal. This notice, it appears, was served on the 26th August 1904, and the appellant himself accompanied the Court peon. In the appellant's affidavit he says that the defendant No. 20 was within the house, to the outer-door of which the notice was fixed. Now, this could not have been true, seeing that the defendant No. 20 had died on the 28th July 1904. Hence the Subordinate Judge disallowed the application for substitution of the heirs of the deceased defendant and directed that the appeal should abate as the defendant No. 20 was a necessary party to the suit.

The plaintiff now appeals to this Court, and on his behalf it is stated that he will not contend that the Subordinate Judge was wrong in saying that the application for substitution of the heirs of the deceased defendant was made out of time, but he urges that the Subordinate Judge was wrong in saying that the appeal should abate because the heirs of the defendant No. 20 were not necessary parties to the suit.

In our opinion, however, this plea cannot prevail. The suit, as mentioned above, was one for dissolution and winding-up of a partnership. It involved the determination of the plaintiff's share and the taking of accounts. The plaintiff's share could not be determined definitely without making all the parties interested in the partnership parties to the suit, and the accounts could not be properly taken in the absence of any of them. The learned pleader for the appellant states that he does not ask for any relief against the defendant No. 20 or her heirs, but only against the defendants Nos. 1 to 4. But it appears to us that this is immaterial. The heirs of the defendant No. 20 are necessary parties to the declaratory decree which must be given in respect of the extent of the plaintiff's share and they are necessary parties to the winding-up of the business and the taking of the accounts which the plaintiff seeks for. The present case seems to be on all fours with the case of *Ramdoyal v. Junmenjoy Coondoo* (1) in which the whole suit was dismissed

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Rampini, J.

because one of the parties to the partnership was not added as a party to the suit in due time.

For these reasons, we are unable to interfere with the order of the Court below, and we dismiss this appeal with costs, which we assess at two gold mohurs.

B. M.

Appeal dismissed.

CIVIL RULE.

Before Mr. Justice Mookerjee and Mr. Justice Holmwood.

MOOL CHAND RAM

v.

SARJOOG PERSHAD.*

CIVIL.

1907.

June, 7.

Civil Procedure Code (XIV of 1882), Secs. 108, 350, 623—Insolvency proceeding—Ex-parte order, setting aside of—Review.

Section 350 of the Civil Procedure Code contemplates that on the date fixed for hearing, the Court shall examine the judgment-debtor in the presence of the persons on whom notice has been served or their pleaders. This should be strictly carried out.

If the objector had no notice of the application for insolvency, he is entitled to apply under section 108 of the Civil Procedure Code to set aside an *ex-parte* order passed under section 350 of the Code; but if notice had been served on him and he was prevented by any sufficient reason from appearing and if the case was heard *ex-parte* under section 350, he is entitled to make an application under section 623 of the Civil Procedure Code to set aside the *ex-parte* order on the ground that it was in contravention of section 350.

Petition for revision by the creditor of an insolvent.

Application by the creditor under sections 108 and 623 of the Civil Procedure Code to set aside an *ex-parte* order declaring the opposite party to be an insolvent.

The facts of the case are sufficiently stated in the judgment.

Babu Jnanendranath Bose for the Petitioner.

Babu Sorashi Churn Mittra for the Opposite party.

The judgment of the Court was as follows :

Mookerjee J.—The present petitioner was an opposing creditor in an insolvency proceeding commenced at the instance of the opposite party Sarjoog Pershad. Notice was issued upon the creditors to appear at the hearing and to oppose the appli-

* Civil Rule No. 1517 of 1907, against the order of E. P. Chapman, Esq District Judge of Mozufferpore, dated the 23rd March 1907.

caution. On the 29th November 1906 the case was fixed for hearing on the 15th December following. The case, however, was not taken up on that date. On the 22nd December, Sarjoog Pershad was examined. The learned District Judge recorded that there was no opposition and as he believed the statements made in the application to be true, he declared the applicant an insolvent. Subsequently the present petitioner on the 21st January 1907 made an application under sections 108 and 623, Civil Procedure Code, to set aside the order of the 22nd December 1906. He stated that he lived at Betia and as he had no information of the date fixed for hearing, he could not appear to oppose the application. This petition came on for hearing but the insolvent did not appear to oppose it. The result was that it was heard *ex-parte* and the original order was set aside under section 108, Civil Procedure Code, on the 2nd March 1907. On the 5th March, the insolvent appeared and made an application under section 623, Civil Procedure Code, to review the *ex-parte* order made on the 2nd March by which the original *ex-parte* order had been set aside. On the 23rd March, the learned District Judge held that the order setting aside the original order was passed under section 108, Civil Procedure Code, which does not apply to such a case as this. The result was that the order made on the 2nd March 1907 was discharged and the original *ex-parte* order by which the opposite party had been declared an insolvent was restored.

The petitioner then moved this Court and obtained this Rule on the ground that section 108, Civil procedure Code, was applicable. We may observe that section 350, Civil Procedure Code, contemplates that on the date fixed for hearing the Court shall examine the judgment-debtor in the presence of the persons on whom notice has been served or their pleaders. If this is strictly carried out, as it ought to be, there should not be any necessity for an *ex-parte* order and consequently no necessity for an application under section 108, Civil Procedure Code. In the present case, however, the petition was heard *ex-parte*. The applicant alleges that he had no notice of the application and could not consequently appear. If so, he would be entitled to apply under section 108, Civil Procedure Code, to set aside the *ex-parte* order. If, on the other hand, notice had been served on him and he was prevented by any sufficient reason from appearing and if the case was heard *ex-parte* under section 350, he would be entitled to make an application under section 623, Civil Procedure Code, to set

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aside the *ex-parte* order, on the ground that it was in contravention of section 350 which contemplates that an applicant for insolvency should be examined in the presence of the persons on whom notice has been served or their pleaders. Whether therefore, the application was treated as one under section 108 or under section 623, it was bound to succeed, seeing that the original order had not been made in the presence of the present petitioner. Under these circumstances, we must hold that the order of the District Judge made on the 2nd March 1907 by which he set aside the original *ex-parte* order was rightly made and ought to be restored.

The Rule will, therefore, be made absolute. The order made on the 23rd March 1907 will be discharged and the order of the 2nd March will be restored with the result that the insolvency case will be restored to the file and will be heard in the presence of the present petitioner.

We make no order as to costs.

A. T. M.

Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Woodroffe and Mr. Justice Cox.

JOGESHWAR NARAIN

v.

LALA MOORALIDHAR AND OTHERS.*

Execution proceedings—Suit—Sale by mortgagee of property not mortgaged, validity of, where to be questioned—Civil Procedure Code (XIV of 1882), Sec. 443—Guardian and Wards Act (XL of 1858), Sec. 3—Appointment of guardian-ad-litem other than the certificated guardian.

Where a puisne mortgagee, who was not made a party to the suit of the prior mortgagee, instead of proceeding against the property sold in execution of the decree of the prior mortgagee, proceeded against other properties of the mortgagor and sold them :

Held, that it was a matter to be complained of and (if wrong) remedied in execution proceedings and not by a separate suit.

If a person, who was not a certificated guardian of the minor, was appointed a guardian-ad-litem at a time when Act XL of 1858 was in force :

Held, that the passing over of the certificated guardian was not more than irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such decree.

Dammar Singh v. Purbhu Singh (1) referred to.

* Appeal from Original Decree No. 161 of 1905, against the decree of Babu Jogendra Chandra Mookerjee, Additional Subordinate Judge of Mozufferpur, dated the 3rd January 1905.

(1) (1907) I. L. R. 29 All. 290.

CIVIL.

1907.

August, 8, 9, 19.

Appeal by the Plaintiff.

Suit for recovery of property.

The facts of the case appear sufficiently from the judgment of the Court.

Babus Umakali Mukerjee, Akshoy Kumar Banerjee and Kulwant Sahay for the Appellant.

Babu Joges Chunder Roy, Moulvi Mahommed Mustafa Khan and Babu Hari Bhushan Mukerjee for the Respondents.

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The following judgments were delivered :

Woodroffe J.—There appears to me to be no substance in this appeal. Several questions were argued but they all, when examined, reduce themselves to one, *viz.*, whether the plaintiff was bound by the various litigations to which he was a party.

The suit is brought for the recovery of 6 properties mentioned in the schedule to the plaint.

The title which the plaintiff makes out is as follows : His father before his birth is alleged to have made a deed of gift of his properties to his wife. Then after his birth his father and mother are alleged to have made a deed of gift to their son the plaintiff. These transactions have in other litigations been found to be unreal transactions got up for the purpose of defeating creditors of the plaintiff's father who is alleged to be a notorious litigant and certainly on the record appears to have been a very considerable one. As one would expect, if this finding was correct, the plaintiff's father notwithstanding the alleged deed of gift dealt with the properties covered thereby as if they were his own. He mortgaged the properties. The mortgagees took proceedings by suit against the plaintiff's father, and in these proceedings both the plaintiff's mother and the plaintiff himself were made parties. In execution, properties were sold and purchased by the decree holder. The claim in respect of properties 2, 3 and 4 in the plaint (the claim in respect of property No. 1 being abandoned, the mortgage transaction being anterior to the plaintiff's birth and the alleged gift to him) is, shortly stated thus. In Ramanadin Chaudhury's suit, the puisne mortgagee of Isapur, *viz.*, Bangsidhar was not made a party. It is, therefore, urged that Bangsidhar's rights were not affected, and he was entitled to sell Isapur notwithstanding the sale and purchase by the first mortgagee. He could not, therefore, it is urged, proceed

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against the other property until he sold the mortgaged property available. Bangsidhar, therefore, was not entitled to sell the third property Rampur Rawoot. Similar objections are taken in respect of a moiety of Harpur Simri, the second property and Bishenpur or Jawahirpur, the fourth property. Assuming that there was an irregularity in the execution proceedings leading to the sale of these properties, that was a matter to be complained of, and (if wrong) remedied in such execution proceedings and not by separate suit.

It has, however, been contended that the plaintiff, though a nominal party to the suits in which these proceedings were held, was not represented therein or if represented, there was fraud or negligence on the part of his guardian-*ad-litem*.

It appears that a certificated guardian named Sheo Gobind Misser was appointed on the 20th March 1880 by the Civil Court at Patna. This appointment by the Patna Court is a peculiar circumstance, as the plaintiff's family lived in Durbhanga. It does not appear that this guardian has done anything or served any purpose except that of being put forward in these proceedings. Thakur Proshad the witness says, he "cannot say who was Jogeshwar's guardian. Several guardians were appointed for him but that he did not see anyone of them doing any work." It is however quite plain from the record that in the suits dealt with in this case, Bodhmal Pershad, a relative of the plaintiff, was formally appointed his guardian. It has been suggested that he did not accept the appointment. But this is clearly negatived by the record showing that pleaders appeared on behalf of the plaintiff as also by the various steps taken by the guardian on behalf of their minor. It is also to be remembered that the plaintiff's father and mother were parties to the suits and were interested in seeing that the interests of their son, if he really had any, were protected. Some point has been made of the fact that the certificated guardian was not appointed. The present provisions of the Code were not then in force, but under section 3 Act XL of 1858 no person was to defend a trial without certificate of administration, provided however, that when the property was of small value or for any other sufficient reason the Court might allow a relative of the minor to defend. Bodhmal Pershad was such a relative. The Act did not require any record of reasons for such an appointment as is now required by section 443 of the Code. It may be that the Court knowingly exercised the discretion given to it, and in the absence of evidence to the contrary;

regularity must be presumed, but if it did not, the passing over of the certificated guardian was not, it has been held, more than an irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such decree (*Dammar Singh v. Purbhu Singh* (1)). From Ext. 20 it appears that other persons than his certificated guardian had on other occasions acted as guardian of the plaintiff. There is no evidence of fraud and indeed the learned pleader for the appellant has not thought it worthwhile to ask us to consider the oral evidence in the case. Nor is there anything to show prejudice or injury to the minor.

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The case as regards the remaining moiety of Harpur Somri is as follows: One Nobin Chandra Banerjee lent money to the plaintiff's father and mother on a promissory note. He instituted a suit on it against them and obtained a decree and in execution attached and sold the property. This was not, it is said, a suit to which the plaintiff was a party, and it is therefore contended that the plaintiff's alleged rights did not pass under the decree against his father and mother. Assuming this to be correct, we find that in these proceedings Bodhmal Pershad who had represented the plaintiff in the suits already referred to and who is now alleged to have acted fraudulently and negligently put in a claim on behalf of the plaintiff. This was disallowed as also an application for a review of the order. Upon this a regular suit was brought by the plaintiff through Bodhmal Pershad to establish his alleged rights. This was dismissed, it being held that the proceeding was one really taken by the plaintiff's father to save his property from his creditors. Lastly as regards properties 5 and 6, it is objected that they would not be sold as the judgment-debtors were not liable to pay the sum of Rs. 50 deposited as poundage fee. This, it is contended, should be paid by the purchaser. This may be so. But it was a point which should have been taken in the execution proceedings and cannot be put forward now. The only question here as in the former cases is whether the plaintiff was so represented in the proceedings as to be bound by them. If he was represented, then there is an end of the matter, whether the orders in execution were good or bad orders. If he was not represented, then he is not bound by the proceedings whatever may have been their character and however unimpeachable they may otherwise have been. During the proceedings under discussion the plaintiff had as his guardian

(1) (1907) I. L. B. 29 All. 290.

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Lala Jogendar Pershad another relative to whom a certificate was issued on the 23rd September 1889. In my opinion the plaintiff was represented in the proceedings referred to. No fraud against him has been proved. The fraud, if there be any appears to have been on the part of the plaintiff's father who has been endeavouring to defeat his creditors. This finding really disposes of the whole appeal. It is not contested that if the plaintiff was represented so as to be bound by the previous proceedings, the finding therein that the alleged deeds of gift by the plaintiff's father and mother were fraudulent and collusive documents is *resjudicata*.

I would, therefore, dismiss this appeal with costs. We allow two sets of costs.

As regards the costs of defendants 1 and 2, they are entitled to full costs Rs. 500 (five hundred), and as regards the costs of defendants 12 and 13, they are entitled to costs, Rs. 150 (Rupees one hundred and fifty.)

Coxe J.—I agree.

A. T. M.

Appeal dismissed.

*Before Hon'ble R. F. Rampini, Acting Chief Justice and
Mr. Justice Sharfuddin.*

HARA KUMARI CHOWDHURANI AND ANOTHER

v.

EASTERN MORTGAGE AND AGENCY COMPANY
LIMITED.*

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August, 6, 7, 8, 13.

*Transfer of Property Act (IV of 1882), Sec. 82—Marshalling—Contribution—
Mortgagor and mortgagee.*

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption, the mortgagee is bound to distribute his debt rateably upon the mortgaged properties.

Krishna Ayyar v. Muthukumarasawmiya (1) and *Raghu Nath v. Har Lal* (2) followed.

Hari Kissen v. Veliat (3), *Surjiram v. Barhamdeo* (4) and *Emam Ali v. Baij Nath Ram* (5) distinguished.

Appeal by the Defendants Nos. 1 and 6.

Suit to enforce a mortgage-bond.

* Appeal from Original Decree No. 61 of 1905, against the decree of Bernard V. Nicholl, Esq., District Judge of Dacca, dated the 9th August 1904.

(1) (1905) I. L. R. 29 Mad. 217.

(3) (1903) I. L. R. 30 Calc. 755.

(2) (1891) I. L. R. 18 Calc. 320.

(4) (1905) I C. L. J. 337.

(5) (1906) 3 C. L. J. 571 ; I. L. R. 33 Calc. 613.

The facts of the case are sufficiently stated in the judgment.

Babus Baikunt Nath Das and Akshoy Kumar Banerji for the Appellants.

Babus Joy Gopal Ghosha and Mohendra Kumar Mitra for the Respondent.

C. A. V.

The judgment of the Court was delivered by

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Hara Kumari Chowdhurani

Eastern Mortgage and Agency Company Limited.

Rampini C. J.—This appeal arises out of a suit brought by the Eastern Mortgage and Agency Company to enforce a mortgage-bond, dated the 22nd March 1882, for one lakh of rupees executed by the executors and heirs of one Krishto Kishor Dutt in their favour.

The terms of the deed are set forth in detail in the judgment of the lower Court. The Judge of that Court has stated that the two pleas pressed before him related (1) to the jurisdiction of the Court, and (2) the execution of the bond by Hara Kumari, the defendant No. 1.

He has decided these points in favour of the plaintiff.

The defendants 1 to 6 now appeal.

On their behalf, the following pleas have been raised :

(1) that the plaintiffs were not entitled to give up their claim for a mortgage-decree against the properties specified in paragraph 10 of the plaint, (2) that they should have made parties the putnidars of two properties named Alimabad and Raipur Nundalpur, (3) that the Judge has not considered the effect of these objections to the plaintiffs' claim, (4) that some of the mortgaged properties are situated in the Dacca District, so that the registration of the deed at Dacca is invalid, (5) that the consideration of the deed was not fully paid, (6) that the execution of the deed by the defendant No. 1 was not an intelligent execution on her part, and (7) that the mortgage is a usufructuary mortgage and that the plaintiffs are bound to account to the defendants.

These pleas are not arranged in logical order.

We propose to discuss the question of registration first.

The Judge has considered the question at length. He has found that there is one small property situated in the Dacca District which rendered valid the registration of the deed at Dacca. He has shown that the existence of this property is proved by the various documents filed in this case, that it was mortgaged once before by deed executed and registered at Dacca and that there is no evidence to show that there is no such property. Mr. Garth in his evidence explains that the deed was registered at Dacca at the defendant No. 1's own

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request to save her the trouble of a journey to Barisal, and that the small property above referred to was included in the deed to enable the deed to be registered at Dacca. The defendant can scarcely fairly turn round now and plead that the registration at Dacca was irregular. Any how, the deed would seem to have been validly registered at Dacca.

The next point in logical order would seem to be, (a) the question of the execution of the deed, and (b) that of the consideration money.

The Judge in the Court below has discussed the first point at full length. He has shown that the utmost care was taken to explain the deed to the defendant No. 1 at the time of execution. It was explained to her both by her own pleader Sarat Chander Bose and by the Sub-registrar. The District Judge had sanctioned the execution of the deed on the presentation of a petition presented in the name of the defendant No. 1 by her pleader Sarat Chander Bose. The many documents and letters written by the defendant No. 1 to Messrs. Garth and Weatherall, her managers, appointed under the deed, are satisfactory proof that she understood its terms quite well.

The next point is the passing of the consideration. The pleader for the appellant urges that there is not sufficient proof of the payment of the lakh of rupees, and its devotion to paying off the debts of the defendant's late husband. There appears to us to be ample proof of this. The money was deposited by the plaintiff Company with Mr. Garth, as settled by the contract, Rs. 10,000 was to be allowed for costs and Solicitor's fees. Now, whether Mr. Garth who was acting for the defendants spent the money in paying off the debts mentioned in the 2nd schedule to the deed, is not a matter for which the plaintiff Company can be held responsible. The appellants' pleader says that it is not proved that Mr. Garth paid off these debts. He says, from the evidence it appears that Mr. Garth paid off only Rs. 72,000 to them. But Mr. Garth states in his evidence that he expended more than Rs. 90,000 for this purpose. The respondents' pleader has handed us a statement, from which it appears from the exhibits filed in the case that Mr. Garth paid off debts amounting to Rs. 90,179. This would appear to be quite correct.

The respondents' pleader further calls our attention to the passage in the judgment of the District Judge in which it is said: "The objection originally raised on the ground of non-

receipt of consideration has not been pressed." It is, therefore, hardly fair of the appellant to raise this plea here. The District Judge goes on to say: "But there is ample documentary proof of the receipt of the consideration money and of its having been disposed of in discharge of the debts for the liquidation of which the loan was raised." We entirely agree with him on this point.

The next question that arises is whether the mortgage-bond was a simple mortgage-deed or a usufructuary mortgage-deed. It is apparent from the terms of the deed that it is an instrument of the former class. There is in the deed a personal covenant to repay. Messrs. Garth and Weatherall, as the deed shows and Mr. Garth himself says, entered on the management of the property as the defendants' agents and not as agents of the plaintiff Company.

There remain the first three pleas raised by the appellant.

The first plea is that the plaintiffs were not justified in giving up their mortgage lien against two properties specified in paragraph 10 of the plaint *viz.*, Krishnanagar and Maniknagar. The facts as disclosed by the evidence are that these properties were sold by Mr. Garth to one Ananda Chander Rai, who granted putnis of the properties. These putnis were at one time bought on behalf of the plaintiff Company, but were subsequently sold and have now passed away into strangers' hands. The plaintiff at first gave up his mortgage claim against the estates, and asked that his mortgage lien might be declared over the putnis. Before the Judge, they gave up their claim over the putnis, which had then passed into their hands. The appellants' pleader contends that this action of the plaintiff Company has the effect of throwing the whole of the mortgage debt on the properties remaining in the hands of the defendants, and that the plaintiff should be compelled to marshal. In support of this plea, he relies on the cases of *Hari Kissen Bhagat v. Veliat Hossein* (1), *Surjiram Marwari v. Barhamdeo Persad* (2), *Emam Ali v. Baij Nath Ram Sahu* (3), and on the terms of section 82 of the Transfer of Property Act. The respondent's pleader cites the case of *Krishna Ayyar v. Muthukumara Sawmiya Pillai* (4). We consider the rule laid down in the last mentioned case is correct. The properties Krishnanagar and Maniknagar

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(1) (1903) I. L. R. 30 Calc. 755.

(2) (1905) 1 C. L. J. 337; 2 C. L. J. 202.

(3) (1906) 3 C. L. J. 576.

(4) (1905) I. L. R. 29 Mad. 217.

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were sold by the defendants' manager. The defendants presumably got the benefit of the sale proceeds. The plaintiff Company agreed to the sale. It is not to be supposed that they would agree to any diminution of their security. There is no evidence of any express agreement between the parties on the subject, but this would appear to be the result of the fact that the defendants did not raise their present plea in the first Court. They then pleaded that the sales made to Ananda Chunder Ray were sham sales and were really purchased by Mr. Garth for himself and should be regarded as purchased for them, or as not affecting them and they never pleaded that Ananda Chunder Ray was a necessary party to the suit. Their case is now completely changed. They now contend, what they did not do before the District Judge, that the plaintiff Company cannot throw the burden of their entire claim on the properties remaining unsold in the hands of the mortgagors. But it would seem to us that the plaintiff Company may do so. They allowed the two properties referred to in paragraph 10 of the plaint to be sold for the benefit of the defendants who must have got the benefit of the sales, and the plaintiff Company may, therefore, fairly ask for a mortgage-decree against the defendants' unsold properties. In any case, the provisions of section 82 of the Transfer of Property Act do not seem applicable. This is not a suit for contribution or marshalling.

It is a suit between mortgagee and mortgagor alone. As laid down in the Madras case, "there is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption, the mortgagee is bound to distribute the debt rateably upon the mortgaged properties." The same view was taken by this Court in *Raghu Nath Pershad v. Harlal Sadhu* (1). If Ananda Chunder Ray, the purchaser of the two properties, were a party to the suit, he might claim rateable distribution of the debt, and the defendant may perhaps hereafter, if not precluded by the terms of the deed of sale executed in Ananda Chunder Ray's favour, claim contribution from him. But in this suit, it is not necessary to rateably distribute the mortgage-debt. In the case of *Hari Kissen Bhagat v. Veliat Hossein* (2), some of the purchasers of portions of the mortgaged property were parties. The circumstances of the cases reported in the *Calcutta Law Journal* are similar.

(1) (1891) I. L. R. 18 Calc. 320.

(2) (1903) I. L. R. 30 Calc. 755.

The last plea of the appellants is that the putnidars of Alimabad and Raipur Nandalalpur should have been made parties to the suit. This plea was not pressed in the first Court. But it appears that Alimabad is itself a putni taluq. The defendants are, or represent the putnidar. The defendants do not say that any one else is the putnidar. It was the putni of Alimabad that was mortgaged to the plaintiff Company.

Raipur Nandalalpur was leased in putni, by Mr. Garth two years after the plaintiff's mortgage. The putnidar, Bykantha Nath Chakrabarti has not been made a party. But there is nothing to show that the plaintiff Company knew of the creation of this putni. The principal place of business of the plaintiff Company is in Calcutta. The putni was created in Dacca, and the property is situated in Barisal. Mr. Garth speaking of another putni says: "I don't suppose we informed the Company before granting the putni. The appellants' pleader urges that the knowledge of Mr. Garth was the knowledge of the plaintiff Company. This does not appear to be sound, for Mr. Garth was not in respect of this matter the agent of the Company, but of the defendants. In any case, the suit is not bad, because the putnidar of Raipur Nandalalpur is not a party. The only result is that his interests are not affected. If he has a right to redeem, he may still do so.

We accordingly dismiss this appeal with costs.

A. T. M.

Appeal dismissed.

*Before Sir Francis William Maclean, K. C. I. E. Chief Justice
and Mr. Justice Coxe.*

HAFEZUDDIN MANDAL AND OTHERS

v.

JADU NATH SAHA AND OTHERS.*

Accounts, suit for—Principal and agent—"Movable property," if includes money—Limitation—Limitation Act (XV of 1877), Schedule II, Articles, 89, 116, 132—Contract of service in writing and registered.

Article 89 of Schedule II of the Limitation Act expressly applies to the case of a principal suing his agent for an account, whilst Article 116 applies to a suit for "compensation for the breach of a contract in writing registered." To ascertain which article of the schedule applies, it is necessary to see what is the relief which the plaintiff claims.

* Appeal from Order No. 478 of 1906, against an order of A. W. Watson, Esq., Officiating District Judge of Marshidabad, dated the 27th August 1906, modifying an order of Babu Bipin Behari Chatterjee, Subordinate Judge of Berhampore, dated the 26th January 1906.

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The expression "movable property" in Article 89 of Schedule II of the Limitation Act includes money.

Asghar Ali Khan v. Khurshed Ali Khan (1), *Jogendra Nath Roy v. Deb Nath Chatterjee* (2), *Madhub Chunder Chuckerbutty v. Debendra Nath Dey* (3) and *Sib Chandra Roy v. Chandra Narain Mukerjee* (4) referred to.

A suit not merely for an account but also to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts, falls within Article 132 of the Second Schedule to the Limitation Act, and the period of limitation is twelve years from the time when the money sued for becomes due.

Appeal by the Defendants.

Suit for accounts and for enforcement of the security for payment of money found due on taking of accounts from the defendants, by the executors of the estate of a deceased principal against his *gomasta* or agent and his surety.

The facts of the case appear sufficiently from the judgment.

Babu Ram Chandra Mazumdar for the Appellants.

Babu Tarak Chandra Chakravarty for the Respondents.

The following judgments were delivered :

Maclean C. J.—This is a suit for accounts by the executors of the estate of a deceased principal against his *gomasta*, who was defendant, No. 1 and his surety, defendant No. 2. The Subordinate Judge dismissed the suit on the ground that it was barred by limitation, holding that Article 89 of the Second Schedule to the Limitation Act applied. The officiating District Judge reversed that decision, holding that the case fell within Article 116. There seems to be some difference of judicial opinion upon the question as to which Article does apply. In the Privy Council case of *Asghar Ali Khan v. Khurshed Ali Khan* (1), the Judicial Committee held that in a case of this nature, Article 89 applied and that the expression "movable property" in that Article included money. The same view was followed by this Court in the case of *Jogendra Nath Roy v. Deb Nath Chatterjee* (2). The same view was also adopted in the case of *Madhub Chunder Chuckerbutty v. Debendra Nath Dey* (3), and in the case of *Sib Chandra Roy v. Chandra Narain Mukerjee* (4) reported in the same volume at page 232. In this case, however, it appears that the contract under which the *gomasta* was appointed *gomasta*, is a registered document. The argument is that as it is a registered document, the case falls within Article 116 of the Second Schedule to the Limitation Act :

(1) (1901) I. L. R. 27 All. 27.

(2) (1903) 8 C. W. N. 113.

(3) (1901) 1 C. L. J. 147.

(4) (1905) 1 C. L. J. 232.

and the respondent relies upon a decision of a Division Bench of this Court also reported in the first volume of the Calcutta Law Journal, *Mati Lal Bose v. Amin Chand Chattopadhyaya* (1), which laid down that where the contract between the parties is under a registered document, the case is governed by Article 116 and not by Article 89. Had the matter rested there, my own view would have been that Article 89 applied and not Article 116. Article 89 expressly applies to the case of a principal suing his agent for an account, whilst article 116 applies to a suit "for compensation for the breach of a contract in writing registered." To ascertain which Article of the Schedule applies, it is important to see what is the relief which the plaintiff claimed. Now, he is not seeking here for compensation or damages for the breach of the contract entered into by the *gomasta* to furnish accounts as he contracted to do, but he is asking for an account simply upon the footing of principal and agent. And, as I have said, if the matter had rested there, I should have been disposed to say that Article 89 and not Article 116 applied. But the matter does not rest there; and, there is to my mind a very important point which has not been noticed by either Court. Both defendants Nos. 1 and 2 hypothecated certain properties, to secure the monies due from the agent, by two documents, a security *habulyat* and a *jaminnama*, and charged those properties with the payment of what might be found due on taking such accounts: and by the third prayer of his plaint, the plaintiff asked that if in the event of defendant Nos. 1 and 2 failing to pay within the time fixed by Court, the money which might be found due to the plaintiff at the time of *nikas* (that is, the accounts) an order might be passed directing recovery thereof from the property pledged by them, and on its proving insufficient, from the person and other properties of defendants Nos. 1 and 2. The result is, that this suit is not merely a suit for an account, but is a suit to enforce in the plaintiff's favour the charge created to secure the monies which might be found due from the agent to his principal on his accounts. That seems to me to be a case which falls within Article 132 of the Second Schedule to the Limitation Act, which enacts that in a suit to enforce payment of money charged upon immoveable property, the period of limitation is twelve years from the time when the money sued for becomes due; the agent was dismissed at the

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(1) (1902) 1 C. L. J. 211.

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commencement of Aghran 1308: the suit was instituted on the 16th December 1904. Looking, therefore, at what is actually claimed by the plaintiff in the suit, I think we cannot properly say that the case falls within article 89 to which I have referred. The appeal, therefore, must be dismissed with costs.

The respondent has not filed any cross-objection, but is satisfied with the accounts which have been directed by the decree of the lower appellate Court, which apparently are for the years 1306, 1307 and 1308 only.

We fix the hearing fee at four gold mohurs.

Coxe J.—I agree.

B. M.

Appeal dismissed.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

OMAR ALI MAJHI

v.

MOONSHI BASIRUDEEN AHMAD.*

CIVIL.

1908.

January, 2, 3.

Civil Procedure Code (Act XIV of 1882), Secs. 310A and 244—Deposit to set aside a sale—Purchaser of a portion of an occupancy holding, right of, to make the deposit—Sale of the holding for its own arrears—Transferability of the holding—Appeal, if lies against an order reversing an order setting aside a sale.

The purchaser of a portion of an occupancy holding, whether it is transferable by custom or not, is entitled to make a deposit under section 310A of the Civil Procedure Code to set aside a sale.

Benodini Dassi v. Peary Mohan Halder (1) and Kunja Behari Mandal v. Sambhu Chandra Roy (2) followed.

The question whether the purchaser of a portion of an occupancy holding is entitled to come in under section 310A of the Civil Procedure Code to make a deposit and to have a sale held for its own arrears set aside is one that comes under clause (c) of section 244 of the Code and an appeal and a second appeal lie in the case.

Phul Chand Ram v. Nursingh Pershad (3) and Azgar Ali v. Asaboddin Kazi (4) referred to.

Appeal by the Applicant.

Application under section 310A of the Civil Procedure Code to make a deposit and to have a sale held for its own arrears by the purchaser of a portion of an occupancy holding, set aside.

* Appeal from Order No. 232 of 1907, against an order of M. Yousuff, Esq., District Judge of Noakhali, dated the 6th April 1907, reversing an order of Babu Atul Chandra Das Gupta, Munsiff of Sudharam, 2nd Court, dated the 4th March 1907.

(1) (1908) 8 C. W. N. 55.

(2) (1908) 8 C. W. N. 232.

(3) (1899) I. L. R. 28 Calc. 73.

(4) (1904) 9 C. W. N. 184.

The facts of the case appear from the judgment.

Babu Dharendra Lal Kastgir for the Appellant.

M. Nuruddin Ahmed for the Respondent.

The judgment of the Court was delivered by

Mitra J.—The question on which the parties were at controversy in the lower Courts has come up before us in Appeal from Order No. 232 of 1907 and Rule No. 2116 of 1907. The appellant was doubtful whether a second appeal would lie to this Court and, therefore, he applied by way of motion under section 622 of the Code. After hearing the learned vakils on both sides and having regard to the cases of *Phul Chand Ram Nursingh Fershad* (1) and *Azgar Ali v. Asaboddin Kazi* (2), we have no doubt that the question between the parties was one that came under clause (c) of section 244 of the Code, and, therefore, an appeal lay to the District Judge and a second appeal lies to this Court. The Rule was unnecessary, and is, therefore, discharged.

The matter in appeal is a very simple one. It is a question of law and no further findings of fact are necessary to enable us to decide finally the dispute between the parties.

The appellant is a purchaser of a portion of an occupancy holding. Whether it is transferable or not is immaterial. The holding was sold for its own arrears and by the sale, after its confirmation, the appellant's interest would be lost. He put in the amount of the decree with the usual costs under section 310A of the Code. An objection was raised that he had no *locus standi*. The Munsiff held that he had. He was the purchaser of a portion of the holding and, as against the judgment-debtors, the original tenants, he had a subsisting interest and he was in possession and was entitled to be so as long as the holding was not extinguished either by sale or by forfeiture. The Munsiff accordingly allowed the deposit to be made and set aside the sale.

The learned Judge of the lower appellate Court came to a different conclusion. He thought that the evidence was insufficient for a finding of transferability of the occupancy holdings according to custom; and, having come to that conclusion, he held that, notwithstanding that the appellant before us was a purchaser of a portion of the occupancy holding, he had no *locus standi*.

(1) (1899) 1. L. R. 28 Cal. 73.

(2) (1904) 9 C. W. No. 184.

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Ahmad.

Mitra, J.

Two of the cases in this Court directly bear upon the point. They are the cases of *Benodini Dassi v. Peary Mohan Haldar* (1) and *Kunja Behari Mandal v. Sambhu Chandra Roy* (2). The learned Judges held in those cases that the purchases of a portion of an occupancy holding, whether it was transferable by custom or not, was entitled to make a deposit under section 310A. The learned vakil for the respondent has attempted to show that those decisions are inconsistent with certain other decisions of this Court which say that the landord is not bound to recognize the sale of a portion of a non-transferable holding.

Those latter cases are distinguishable from the present case, and we need not discuss them here. We are of opinion that the rule laid down in the cases we have referred to in *Benodini Dassi v. Peary Mohan* (1) and *Kunja Behari v. Sambhu Chandra* (2) is equitable and we see no reason why we should come to a different conclusion. We accordingly allow the appeal and direct that the order of the Munsff be restored with costs. We assess the hearing fee in this Court at three gold mohurs.

B. M.

Appeal allowed.

(1) (1903) 8 C. W. N. 55.

(2) (1903) 8 C. W. N. 232.

Before Mr. Justice Hill and Mr. Justice Brett.

SATIS CHUNDER CHATTOPADHYA AND OTHERS

v.

RAI JATINDRA NATH CHOWDHURY AND OTHERS.*

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1902.

July, 16 31.

Compensation, apportionment of, principle—Maurasidar—Durmaurasidar—Enhancement—Contract of tenancy—Transfer of Property Act—Durmaurasi moharari, what it connotes—Rent, abatement of—Contingency, value of, onus of proof, on whom.

The Transfer of Property Act gives no authority to a landlord to enhance the rent of his tenant during the term of the lease, whether it be in perpetuity or for a definite term.

The word *maurasidar* does not convey the idea of a right to fixity of rent; *durmaurasi moharari* implies fixity of rent.

The right of enhancement is not an incident of every contract of tenancy.

In a proceeding for apportionment under the Land Acquisition Act, no abatement of rent can be made without the consent of the parties.

The compensation is to be apportioned between the parties according to the value of the interest which each of them parts with. The zemindar has a right to the fixed rent and the loss he sustained is of so much of his rent. Any other

* Appeals from Original Decrees Nos. 140, 133 and 166 of 1899, against the decrees of J. Pratt Esq., District Judge of 24-Parganahs.

possible injury, such as the chance of the *putnidar* throwing up the land and its being diminished in value by what has been taken by Government, and still remaining as it did, liable to pay the same revenue, is not appreciable and cannot be taken into account. If there is no abatement of the rent and the *putnidar* continues liable to pay to the zemindar the same rent as he had to pay before, there would be nothing for which the zemindar is to receive compensation. The same rule applies to the case of lease in perpetuity with fixity of rent.

Raye Kissory Dassee v. Nilcant Day (1) followed.

Godadhar Dass v. Dhunput Sing (2) commented on.

The burden of proof is on the zemindar to make out his claim and show as to the value of a particular contingency to him.

Shama Prosunno Bys Mozumdar v. Brahoda Sundari Dasi (3) followed.

Proceedings for apportionment of compensation.

The facts of the case appear sufficiently from the judgment.

Babus Lal Mohun Doss and Ashutosh Mukerjee for the Appellants in Appeal No. 140.

Drs. Rash Behary Ghose and Sarat Chunder Banerji and Babus Jagut Chunder Banerji and Charu Chunder Ghose for the Respondents.

Babus Nil Madhub Bose and Benode Behary Mukerji for the Appellants in Appeal No. 133.

Dr. Rash Behary Ghose and Babus Jagut Chunder Banerji and Charu Chunder Ghose for the Respondents.

Babus Haro Kumar Mitter and Sanut Chunder Pal for the Appellants in Appeal No. 166.

Dr. Rash Behary Ghose and Babus Jagut Chunder Banerji and Charu Chunder Ghose for the Respondents.

C. A. V.

The judgment of the Court was as follows:

Hill J.—We think that no sufficient reason has been made out by any of the appellants now before us for disturbing or modifying the order of the Court below. In some of the conclusions of the learned Judge, we are indeed unable to agree, but on the whole we think he has arrived at a result which is not in the circumstances of the present case improper.

We think the learned Judge was right as to the recognition by the appellants of the validity of the respondents' lease. He and his predecessors have held under it for more than forty years paying rent directly under an arrangement with their immediate landlord to the zemindar, as a body in the character of *maurasi-dars* and spending very considerable sums in the permanent im-

(1) (1873) 20 W. R. 370.

(2) (1881) 1. L. R. 7 Calc. 585.

(3) (1900) 1. L. R. 28 Calc. 146.

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provement of the property. It was said however that assuming the appellants to have accepted the respondent as a permanent tenant, it did not follow that they had by so doing abandoned or deprived themselves of their right of enhancing the rent of his tenure: that such a right was of considerable value to the landlord and that the appellants ought, therefore, to have received compensation in respect of it, as well as of other rights which a landlord retains in the subject of the demise notwithstanding that it may be in perpetuity. To these latter we shall not refer at present, but as regards the right of enhancement, the question is whether the appellants have shown that they possess such a right. As to this, the learned Judge observes: "But I have no materials before me from which I can infer that the rent is fixed and may not be enhanced." And so far no doubt he takes a view favourable to the appellant's contention. Logically it might be supposed that holding that opinion, he would have found the appellants to be entitled to compensation for the partial loss of that right which can hardly be said to be valueless or incapable of appraisal. But he has not taken it into consideration. The right of the appellants to enhance the rent is, however, one of the points upon which we feel it difficult to agree with the learned Judge. The argument addressed to us on their behalf was that when the right of enhancement is not excluded in express terms by the lease, it must be taken to exist. It was, however, conceded that the leases in question in this case are not governed by the Bengal Tenancy Act and admittedly recourse must, therefore, be had to the Transfer of Property Act for the determination of the rights of the parties in so far as they are not provided for by the leases themselves. But the latter Act gives no authority to a landlord to enhance the rent of his tenant during the term of the lease, and we can see no difference in principle in this respect between a lease in perpetuity and a lease for a definite term. The observation of the learned Judge mentioned above relates, we presume, to the lease of the *maurasidar*, there being nothing in its language from which a right to fixity of rent could be inferred, while that of the respondent is described as a *durmaurasi mokarari puttah*, a description which would imply fixity of rent. The contention of the appellant also is applicable only to the former lease. But the difference is immaterial unless in this country the right of enhancement is, if not excluded, an implied incident of every contract of tenancy, but we have been referred to no authority for this. It must, therefore, we think be—taken and assuming that

there exists between the appellants and the respondent such a privity as would in the case of an enhancible tenure give the former the right to enhance, that in the present case neither the rent of the respondent nor of the holder of the superior tenure could be enhanced.

Another point to which we wish to advert in the judgment of the learned Judge is his statement that he will "allow no abatement of the rent payable either to the zemindars or to the *maurasidar*." He makes the non-abatement of the rent the foundation of his decision as to the manner of apportionment. But we are unaware of any authority existing in a Court to which a reference has been made under the provisions of section 30 of the Land Acquisition Act either to allow or disallow an abatement of rent, nor has any of the learned vakils engaged in the case, been able to indicate the source from which the authority which the learned Judge purported to exercise, was derived. Unless the parties agreed to an abatement, we do not know how in such a proceeding as the present it could be effected. However, though the learned Judge was not, we think, competent to deal with this matter, there has in point of fact been no abatement of rent and the case must be dealt with on that footing, though, it is not improbable that had we been satisfied that we possessed the authority to make an abatement, we should have dealt with it differently.

[Their Lordships then dealt with appeal No. 151 of 1899 which is not necessary for this Report.]

The only person with whom we are now concerned (leaving out of view for the present the appellants in Appeal No. 151 of 1899) are the zemindars (the appellants in Appeals Nos. 133, 140 and 166 of 1899) on the one hand and the sub-*maurasidar* on the other; [See *Godadhar Dass v. Dhunput Sing* (1).] It was on that footing, it may be observed, that the appeals were argued before us.

The question, therefore, reduces itself to this, namely, whether as between the zemindars and the respondent, who is the holder of a permanent heritable tenure, the rent of which is not enhancible, the disposition of the compensation money made by the learned Judge is maintainable. He has proceeded upon a principle indicated in *Raye Kissory Dassee v. Nilcant Day* (2), and has given the whole of the sum awarded by way of compensation to the respondent. What Couch C. J. says in that case is: "The compensation ought to be apportioned between the

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(2) (1873) 20 W. R. 370.

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parties according to the value of the interest which each of them parts with. The zemindar has a right to the fixed rent and the loss he sustains is of so much of his rent. Any other possible injury, such as the chance of the putindar throwing up the land and its being diminished in value by what has been taken by Government, and still remaining as it did, liable to pay the same revenue is, we think, not appreciable and cannot be taken into account. If there is no abatement of the rent and the putindar continues liable to pay to the zemindar the same rent as he had to pay before, there would be nothing for which the zemindar ought to receive compensation. He would be in the same position as before. Except with reference, as we have said to the possibility of a loss which is scarcely appreciable." In later cases a different view of the interests of the zemindar has been taken, notably in the case of *Godadhar Dass v. Dhunput Sing* (1) where Garth C. J. said: "as regards the zemindar, it is a mistake to suppose that his interest in the land is confined entirely to the rent which he receives from the putindar. He is the owner of it under the Government, and in the event of the *putni* coming to an end by sale, forfeiture or otherwise, the property would revert to the zemindar who might deal with it as he pleased in its improved state: and although in some cases, and possibly in this, the chances of the *putni* coming to an end may be more or less remote, there is no doubt that in all cases, the zemindar is entitled to some compensation (small though it be) for the loss of his rights." The learned Chief Justice, however, lays down no rule for the ascertainment of the value of the zemindar's interests and indeed the zemindar in that case was not a party to the appeal (the only claimants in the appellate state of the suit being the *putindar* and *durputindar*) and was on that account excluded from sharing in the sum awarded as compensation, the whole of which had been given by the lower Court to the putindar. Other cases were cited to us in which varying methods of apportionment have been resorted to. It is unnecessary, however, we think to refer more particularly to them, for it would be difficult to extract from them any definite principle for our guidance. Indeed it was said in one of the cases cited that each case must be dealt with in accordance with its own peculiar circumstances, and that no definite rule applicable to all could be laid down (2).

(1) (1881) I. L. R. 7 Cal. 585.

(2) *Maharaja Bir Chunder Manikya Bahadur v. Nabin Chunder Dutt* (1897) 2 C. W. N. 453.—Rep.

So far then we are left with the divergent views of Couch C. J. and Garth C. J., the former regarding the interests of the zemindar as a negligible quantity and the latter as affording a basis for some compensation however small. It is true that the leases with which the learned Chief Justices had to deal were *putni* leases, but the cases cannot, we think on that ground, well be distinguished in principle from the present, where we have a lease in perpetuity with fixity of rent. But the possible reverter of the property to the zemindar in the event of the *putni* coming to an end by sale or forfeiture to which Garth C. J. refers as entitling the zemindar to some compensation, can we think hardly be taken into consideration in the present case, as a basis for compensation and indeed it is not clear to us how the contingency of the property reverting to the zemindar on the sale of a *putni* could give him a present right of appreciable value. The learned Chief Justice had presumably a sale for arrears of rent and a purchase by the zemindar in contemplation, for we do not see how otherwise (for a private sale was clearly not intended) the property could revert to him. But he could only purchase as one of the public, and unless it is to be assumed that he would purchase at an inadequate price, we find it difficult to perceive of what value this particular contingency could be to him. As to forfeiture, that would presumably depend mainly on the terms of the lease. But in the present case there is no provision for a forfeiture for any cause in either of the leases. Certain other contingencies and possibilities were suggested at the bar which, it was contended, gave a right to the appellants to share in the compensation, but they appeared to us so very remote as to be quite inappreciable. But at all events, we think (as was said by the present Chief Justice in *Shama Prosanno Bose Mozumdar v. Brakoda Sundari Dasi* (1) that it lies on the zemindar to make out his claim and to show what its true value is, but no attempt was made by the appellants either in the Court below or here to do this. Indeed in the Court below it would seem that these contingencies were not referred to at all. In the case just mentioned we may add, the Court held that besides the capitalized value of the rent lost to the zemindar, his chance of an enhancement of the existing rent was the only other loss sustained by him in respect of which he was entitled to compensation. In the present case, however, we have already stated our reasons for thinking that the appellants had no right of

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1) (1900) I. L. B. 28 Calc. 146.

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enhancement, and as there has been no abatement of rent they have lost nothing under this head. So that the case, which was claimed as an authority in support of the appellant's contentions, seems to us to tend rather the contrary way. If the parties had agreed to an abatement of rent, the position of things would of course have been different, but although the respondent's learned vakil was willing on behalf of his client to accept an abatement, and on that footing, that the appellants should receive so much of the compensation money as represented the capitalized value of the abatement, the appellants declined to accept the offer insisting that they were entitled not only to that but to very much more.

Having given the case our careful consideration, we see no reason for thinking that the learned Judge was wrong in following the principles indicated by Couch C. J. in *Raye Kissori Dassi v. Nilcunt Dey* (1), and the appeals of the zeminder appellants *i.e.*, appeals 133, 140 and 166 of 1899 must we think accordingly be dismissed with costs.

[Their Lordships then dealt with appeal No. 151 of 1899 which is not necessary for this report.]

A. T. M.

Appeal dismissed.

(1) (1878) 20 W. R. 370.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

KISHORI MOHAN SANYAL AND OTHERS

v.

SHIB CHANDRA LAHIRI.*

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July, 5, 19, 29.

*Maintenance deed, construction of—"Putra, pautradi santan" meaning of—
Intention.*

In construing a deed, the question is not what the parties to a deed may have intended to do by entering into the deed, but what is the meaning of the words used in that deed.

Monypenny v. Monypenny (1) followed.

Srinibash v. Monmohini (2) and *Megh Lal v. Raj Kumar* (3) referred to.

The words "*putra pautradi santan*" (sons, grandsons and the like issue) have a definite and well-ascertained meaning and mean all the heirs, male and female, though the two heirs expressly mentioned are the first two of the male heirs.

Ram Lal Mookerjee v. Secretary of State (4), *Bhoobun Mohini v. Hurriah Chunder* (5) and *Lalit Mohun v. Chukhun Lal* (6) referred to.

The word '*santan*' means issue both male and female.

Kristo Kishore v. Seetamonee (7) and *Huris Chunder v. Chunder Monee* (8) referred to.

In a deed of maintenance, the grantor used the following words: "Upon your death, your sons, grandsons and the like issue, that is your male successors in the descending line shall continue to get the same."

Held, that the words "your male successors in the descending line" are not explanatory, but are used in a restrictive sense to exclude female heirs.

Held, on a construction of the deed that upon the death of the wife leaving a daughter, no right to the maintenance allowance accrued to the husband.

Appeal by the Plaintiff.

Suit for a declaration that the plaintiffs are entitled to maintenance under a maintenance deed.

The facts of the case appear sufficiently from the judgment of the Court.

Babus Nilmadhub Bose and Debendra Nath Bagchi for the Appellants.

Babus Golap Chandra Sarkar and Mohini Mohan Chuckerbutty for the Respondent.

* Appeal from Appellate Decree No. 2310 of 1905, against the decree of J. A. Eschial Esq., District Judge of Bungpur, dated the 3rd November 1905, affirming that of Babu Kanti Chunder Mukherji, Subordinate Judge of Bungpur, dated the 14th August 1905.

(1) (1861) 9 H. L. C. 114 (146).

(2) (1906) 3 C. L. J. 234 (234).

(3) (1906) 5 C. L. J. 208 (215); I. L. R. 34 Calc. 353 (367).

(4) (1881) L. R. 8 I. A. 46 (62); I. L. R. 7 Calc. 304 (315).

(5) (1878) L. R. 5 I. A. 133 (147); I. L. R. 4 Calc. 23 (27); 2 C. L. R. 339 (343).

(6) (1897) L. R. 24 I. A. 76 (88); I. L. R. 24 Calc. 334 (349).

(7) (1867) 7 W. R. 320.

(8) (1875) 24 W. R. 263.

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Kishori Mohan
Sanyal
v.
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Lahiri.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal on behalf of the plaintiffs for construction of a deed of maintenance executed on the 16th September 1877 by one Shib Chandra Lahiri, adoptive father of the defendant respondent in favour of Kumud Kamini Debi, the deceased wife of the first plaintiff appellant. Shib Chandra married the sister of Ram Sunder, the father of Kumud Kamini; he appears to have entertained feelings of affection for her and provided for her maintenance by the deed which we are now invited to construe. Kumud Kamini left a daughter Kusum Kamini who is the sixth plaintiff in this suit. After the death of Kumud Kamini, the first plaintiff, her husband, took a second wife and the children of the second marriage are the other plaintiffs in the suit. The plaintiffs contend, that they or some of them are entitled to maintenance under the deed. The Courts below have concurrently negatived their claim. The question in controversy in this appeal is as to the true construction of the deed, the material portion of which may be translated as follows :

“As it is my duty to fix an allowance for your maintenance, in the full possession of my senses and in a sound state of my health, I make a gift to you of a sum of Rs. 120 per annum at the rate of Rs. 10 per mensem; so that you shall yourself get the said sum of Rs. 120 per annum as long as you live. Upon your death, your sons, grandsons and the like issue, that is, your male successors in the descending line shall continue to get (the same). And your widowed daughter, if she leads a life true to her religion, shall get for life out of the said sum, a sum of Rs. 60 year by year at the rate of Rs. 5 per mensem, and your successors as described above will get the remainder; and upon the death of such daughter, your successors of the kind described above shall continue to get year after year the entire sum of Rs. 120 inclusive of the sum payable to her. If you die without issue, and yet if your husband survives, then your husband shall get throughout his lifetime the said sum of Rs. 120. If you have no successors as described above, (the said money) shall revert to my estate and I or my heirs shall get the same.”

It is obvious from the terms of the deed set forth above that there is no foundation for the claim of either the daughter or the step sons of Kumud Kamini, and the controversy has substantially centred round the claim of the husband. It has been argued on his behalf that although the word '*santan*' (issue) includes

issue both male and female, the grantor used the word in a restricted sense, *namely*, to indicate male issue only, and that consequently when the deed speaks of the death of the grantee '*nis santan*,' it means death without male issue. If this contention were to prevail, the husband would be entitled to succeed, because Kumud Kamini died leaving a daughter the sixth plaintiff, but no male issue. It has been argued, on the other hand, on behalf of the defendant respondent that the word '*santan*' is used throughout by the grantor in its ordinary sense of issue, that when the grantor speaks of "sons, grandsons and the like issue," he finds it necessary to use qualifying words so as to restrict the grant to male descendants only, and that when he uses the word '*mis-santan*' without any qualification, he means without issue (male or female). The question, therefore, ultimately narrows down to this, whether the words "that is, your male successors in the descending line" are merely explanatory or are intended to qualify or restrict the phrase "your sons, grandsons and the like issue" which immediately precedes. After a careful consideration of the whole of the deed, the conclusion seems to us to be irresistible that the words are not explanatory but restrictive. In the first place, the words '*putra pautradi santan*' (sons, grandsons and the like issue) have a perfectly definite and well ascertained meaning. They mean all the heirs, male and female, though the two heirs expressly mentioned are the first two of the male heirs. [*Ram Lal Mookerjee v. Secretary of State* (1), *Bhoobun Mohini v. Hurrish Chunder* (2) and *Lalit Mohun v. Chukkun Lal* (3)]. It has not been questioned and in view of the decision of this Court in *Kristo Kishore v. Seetamonee* (4), *Huris Chunder v. Chunder Monee* (5), [which was reversed on appeal by the Judicial Committee upon a ground not material to the present question,] it cannot be doubted that the word '*santan*' means issue both male and female. It is reasonably plain, therefore, that the grantor having used the words "your sons, grandsons and the like issue" which would undoubtedly include both male and female heirs used the restrictive words "your male successors in the descending line" with a view to exclude female heirs. The contention of the appellant, therefore, that the word '*santan*' is used by the grantor in a limited sense is not well founded and the inference sought to be drawn that

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(1) (1881) L. R. 8 I. A. 46 at (62); I. L. R. 7 Calc. 304 at (315).

(2) (1878) L. R. 5 I. A. 138 (147).

(3) (1897) L. R. 24 I. A. 76 (88); I. L. R. 24 Calc. 834.

(4) (1867) 7 W. R. 320.

(5) (1875) 24 W. R. 268.

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'*nis-santan*' means without male issue is not supported by the context. This construction receives support from two other considerations. It will be noticed in the first place that if the interpretation which the appellant seeks to put upon the word '*nis-santan*' be accepted, the word becomes the precise equivalent of "without heirs of the kind described above." To indicate however such heirs, the grantor uses an entirely different phrase in two places, namely the words '*ai mata uttaradhihari*' which occur immediately before and after the word '*nis-santan*'. It is difficult to understand why the grantor should introduce the word '*nis-santan*' if he meant to indicate, not the absence of all issue but merely the absence of male heirs of the class previously described. In the second place, it must be noticed that if the word '*nis-santan*' be taken to mean according to the contention of the appellant, without male issue, the provision for the maintenance of the husband may conflict with the provision for the maintenance of the widowed daughter. Upon the death of Kumud Kamini, the allowance of Rs. 120 was to be taken, half by the widowed daughter and half by the male issue in the descending line. If the husband be taken to be entitled to get the whole of the Rs. 120 upon the death of Kumud Kamini without male issue, what would become of the maintenance of the widowed daughter? The two provisions become perfectly consistent, if the right of the husband is construed to arise only in the event of the death of Kumud Kamini without any issue male or female. This furnishes an answer to an argument which was advanced with some plausibility on behalf of the appellant; it was said, why should the grantor postpone the husband to a daughter when the daughter could not under any circumstances get any maintenance. The evident object was that the husband should come in only upon death of his wife without issue, male and female, (which would of course include the widowed daughter). Upon a review then of all the provisions of the deed, the only reasonable construction seems to be that the husband was to become entitled to the maintenance allowance only if his wife died without issue, male or female. It follows consequently that in the event which has happened, namely upon the death of the wife leaving a daughter, no right to the maintenance allowance accrued to the husband.

Reference was made at the bar to the provisions of a will executed by the grantor on the same date as the deed of maintenance. The will recites that the deed of maintenance had been

executed and reproduces its terms with some variations of language. It was argued on behalf of the respondent that the recitals in the will make it quite clear that the interpretation suggested by him gives effect to the true intention of the grantor. On behalf of the appellant it was suggested that the recitals in the will do not throw any additional light on the matter. We have, however, thought it safer to construe the deed of maintenance independently of the recitals in the will. What we have to ascertain is the intention of the grantor as expressed in the instrument itself and not what the grantor thought he had done. As was observed by Lord Wensleydale in *Monypenny v. Monypenny* (1), "the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in that deed; a most important distinction in all cases of construction and the disregard of which often leads to erroneous conclusions." This is a sound rule of construction which has been repeatedly applied to the construction of wills and deeds in this country. [*Srinibash v. Monmohini* (2) *Megh Lal v. Raj Kumar* (3)].

The result, therefore, is that the decree of dismissal made by the Courts below must be affirmed and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1861) 9 H. L. C. 114 (146).

(2) 1906) 3 O. L. J. 224.

(3) 1906) 5 O. L. J. 208; I. L. R. 34 Calc. 358.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

BANSHI SINGH AND OTHERS

v.

PALIT SINGH AND ANOTHER.*

Civil Procedure Code (XIV of 1882), Sec. 136, scope of—Discretion—Defence, when to be struck off.

Section 136 of the Code of Civil Procedure is based upon Order 31, Rule 21 of the Supreme Courts in England. It renders the defendant liable to have his defence struck out upon failure to answer an interrogatory. It does not make it obligatory upon the Court to strike out the defence under all circumstances whatever.

Twycroft v. Grant (1), *Twycroft v. Grant* (2), *Hartly v. Owen* (3), *Sham Kishore v. Shoshi Bhoosun* (4) and *Khajah Assenoolia v. Khajah Abdool* (5) referred to.

* Appeal from Original Decree No. 238 of 1907, against the decision of Babu Ambica Charan Dutt, Subordinate Judge of Durbhanga, dated the 10th June 1907.

(1) (1875) W. N. (Eng) 201.

(3) (1876) W. N. (Eng) 193; 34 L. T. 752.

(2) (1875) W. N. (Eng) 229.

(4) (1880) I. L. R. 5 Calc. 707; 5 C. L. R. 509.

(5) (1883) I. L. R. 9 Calc. 923.

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Palit Singh.

If there is obstinacy or contumacy on the part of the defendants or a wilful attempt to disregard the order of the Court, an order under section 136 of the Civil Procedure Code is appropriate.

Appeal by the Defendants.

Suit for partition.

The facts and arguments appear sufficiently from the judgment of the Court.

Babus Joges Chunder Roy and Luchmi Narain Singh for the Appellants.

Babus Umakali Mukerji and Baldeo Narain Singh for the Respondents.

The judgment of the Court was delivered by

Mookerjee J.—This is an appeal on behalf of the defendants against a preliminary decree in a suit for partition of joint family properties.

The case for the defendants has not been investigated in as much as their answer was struck out under section 136 of the Code of Civil Procedure by reason of their failure to answer an interrogatory, and the substantial question raised in this appeal is, whether the order under section 136 was properly made.

It appears that in the written statement which was filed by the defendants they alleged that the suit had not been properly framed in as much as many of the properties which belonged to the joint family had been omitted from the plaint. Thereupon the plaintiffs amended their plaint, but subsequently an issue was raised to the effect whether the suit was maintainable on account of the omission of certain properties from the plaint. The plaintiffs then served an interrogatory upon the defendants and called upon them to state precisely what properties of the joint family had been omitted from the plaint. The defendants did not file any answer to this interrogatory and on the 30th April 1907, the plaintiffs obtained an order from the Court to the effect that the defendants should file an answer within a week. The time fixed by the Court expired on the 7th May. No answer was filed by the defendants. No action, however, was taken by the plaintiffs, but on the date fixed for the hearing of the suit, that is, the 10th June 1907, the plaintiffs prayed that the defence might be struck off inasmuch as the defendants had failed to comply with the order of the Court to answer the interrogatory within the period fixed.

The learned Subordinate Judge held that the provisions of section 136 of the Code of Civil Procedure were mandatory and

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that it was neither open to him to give further time to the defendants nor to exercise his discretion in any manner in their favour. In this view of the matter he concluded that the defendants must be subjected to the operation of the provisions of section 136 and their defence was struck off with the result that they were placed in the same position as if they did not appear and file any answer to the plaint. Immediately after this, the defendants made an application to the Subordinate Judge and asked him to set aside their order, as there were good grounds why they should not furnish an answer to the interrogatory. They contended that after their written statement had been filed, the plaint had been amended and the properties which had originally been omitted from the plaint were subsequently included in the suit, with the result that it became unnecessary for the defendants to answer the interrogatory. The Subordinate Judge, however, did not accept this explanation and held that the provisions of section 136 were imperative and must be enforced.

After this order had been made, another application was presented to the Subordinate Judge to reconsider the matter. He treated this petition as groundless and vexatious, and proceeded to hear the suit *ex parte*. One of the plaintiffs was examined and he gave evidence which appeared to the Subordinate Judge to be sufficient to establish the case for all the plaintiffs. He accordingly made a preliminary decree for partition and directed the appointment of a Commissioner to divide the chief properties. It is this preliminary decree which is now challenged before us.

It has been argued by the learned vakil for the appellants that the Subordinate Judge has taken an erroneous view of the scope of section 136, that its terms show that the provisions are not mandatory and that the Court has ample discretion whether it would or would not strike out the defence of any of the defendants who might be found to have failed to comply with the order of the Court, and further that upon the facts of the case as to which there is no dispute, no order under section 136 ought to have been made. In our opinion these contentions are well founded, and must prevail.

Section 136 provides that "if any party fails to comply with any order under this Chapter, to answer interrogatories or for discovery, production or inspection, which has been duly served, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and if a defendant to have his defence, if any, struck out, and to be placed in the same position as if he had not

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Mookerjee J.

appeared and answered." This section simply renders the defendant liable to have his defence struck out upon failure to answer an interrogatory. It does not make it obligatory upon the Court to strike out the defence under all circumstances whatever. This action is based upon order 31 Rule 21 of the Rules of the Supreme Court in England, and under those Rules it has been repeatedly held that it is not obligatory upon a Court to strike out the defence merely because there has been a failure to answer an interrogatory. This is clear from the decisions in the cases of *Twycroft v. Grant* (1), *Twycross v. Grant* (2) and *Hartley v. Owen* (3).

In the first of these cases, Mr. Justice Lush stated that he would not direct the defence to be struck out except in the last resort. In the second case, Mr. Justice Quain gave the defendants 24 hours to file their answers although there had been as the learned Judge stated a frightful procrastination on their part. In the third case, Vice-Chancellor Hall stated that it was not imperative on the Court to dismiss the action and that the proper order to make was that time should be granted upon payment of costs. The power of the Court to take action is optional, not obligatory, and the Court will be slow to exercise it, unless the default is wilful and with full knowledge [*Haigh v. Haigh* (4), *Farden v. Richts* (5), *Fenney v. Mackintosh* (6).] The same view has been adopted by this Court. See *Sham Kishore Mundle v. Shoshibhoosan Biswas* (7), and *Khajah Assenoolla Foo v. Khajah Abdul Aziz* (8).

It is clear, therefore, that the learned Subordinate Judge was in error when he assumed that he had no discretion in the matter.

The only other question which requires consideration is whether under the circumstances of this particular case an order under section 136 was appropriate. In our opinion, no such order was necessary in the interests of justice. The interrogatory in question was to the effect, what properties of the joint family had been omitted from the plaint. If the defendants omitted to answer the interrogatory, the result would be that they would practically abandon their defence, that the suit was not maintainable, because some of the joint properties had been excluded from the plaint. No doubt if there was obstinacy or contumacy on the

(1) (1875) W. N. (Eng.) 201.

(5) (1889) 22 Q. B. D. 124.

(2) (1875) W. N. (Eng.) 229.

(6) (1889) 61 L. T. 108.

(3) (1876) W. N. (Eng.) 193; 34 L. T. 752.

(7) (1880) I. L. R. 5 Calc. 707.

(4) (1885) 31 Ch. D. 478.

(8) (1883) I. L. R. 9 Calc. 923.

part of the defendants or a wilful attempt to disregard the order of the Court, an order under section 136 would be perfectly justified. Here, however, there was no room for any such suggestion, and, it is reasonably plain that the interrogatory was left unanswered, because an answer had become unnecessary by reason of the amendment in the plaint. Indeed, the issue which had been raised subsequently to the amendment of the plaint, ought not to have been raised. In our opinion, it was not a proper exercise of discretion on the part of the Subordinate Judge to strike out the defence and to hear the case *ex parte*.

This appeal must, therefore, be allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that he may deal with it on the merits after the defendants have been allowed an opportunity to prove their case. The plaintiffs also will have an opportunity to adduce evidence which was not tendered because the case was heard *ex parte*.

As regards costs, the learned vakil for the appellants does not dispute that there was some default, however, unintentional, on the part of his clients in the Court below. The proper order to make is that the defendants do pay the plaintiffs their costs in the Court below which we assess at three gold mohurs.

The costs of the present appeal will abide the result.

A. T. M.

Appeal allowed; case remanded.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

SHIBKUMAR LAL PANDAY AND OTHERS

v.

MAIDHUR GAZI.*

Code of Civil Procedure (Act XIV of 1882), Sec. 244—'Representative,' who is—Beneficial owner.

A person for whom the predecessor of the judgment-debtors was the *benamdar* and who is therefore really interested in protecting the property, is a 'representative' of the judgment-debtors within the meaning of section 244 of the Civil Procedure Code.

Appeal by the Decree-holders.

Application for setting aside an execution sale.

The main question was whether the applicant was a representative of the judgment-debtors within the meaning of section 244 of the Civil Procedure Code.

* Appeal from Order No. 84 of 1907 against an order of Babu Srish Chandra Mukerji, Subordinate Judge, Tippera, dated the 1st December 1906, affirming that of Babu Rajendra Lal Sadhu, Munsiff of Comilla, dated the 25th July 1906.

CIVIL.

1907.

Banabai Singh

Palit Singh.

Mookerjee, J.

CIVIL.

1908.

January, 2.

CIVIL.

1908.

Shib Kumar Lal
Panday
v.
Maidhur Gazi.

Babus Satish Chandra Ghose and Anilendra Nath Roy Chaudhuri for the Appellants.

Babu Upendra Lal Gupta Roy for the Respondent.

The judgment of the Court was delivered by

Mitra J.—Two points have been argued before us in this case. The first is that the predecessor of some of the judgment-debtors being a *benamdar* of the applicant, has no *locus standi* under sec. 244 of the Code to apply for setting aside the sale. If it is found, as has been distinctly found, by both the lower Courts, that the predecessor of the judgment-debtors was a *benamdar* of the applicant and that the applicant was really interested in protecting the property, it would be difficult to hold that he was not a representative within the meaning of the words of Sec. 244 of the Code. The decisions of this Court have given the word 'representative' the widest meaning and the word has been broadly defined. It includes not only heirs and executors but also assignees or legal representatives in the strict sense of the words, that is, persons interested in saving the property from being sold, and whose interest would be jeopardized if the sale were not set aside. We agree in those decisions. The first point, therefore, fails.

The second point argued before us is that the finding of fact arrived at by the lower appellate Court does not warrant the conclusion of fraud. We have gone through the judgment of the Court of appeal and we have no doubt that the learned Judge of the lower appellate Court intended to find that the sale proclamation was suppressed and that the sale was a fraudulent one.

We accordingly dismiss this appeal with costs, two gold mohurs.

N. K. B.

Appeal dismissed.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

UPENDRA CHANDRA SINGH

v.

SAKHI CHAND.*

CIVIL.

1907.

March, 6.

Mesne profits, application to determine—Dismissal for default—Fresh application—Limitation—Striking off and dismissal of, application, difference between—Decree, execution of, application for.

Applications to determine mesne-profits are treated as applications for execution of the decree and the striking off of such cases does not finally decide them or prevent the decree-holder from making a further application for the determination of mesne profits.

There is no substantial distinction between an order striking off an application and one dismissing it for default.

Application for ascertainment of mesne-profits.

Appeal by the Judgment-debtor.

The facts of the case appear fully from the judgment.

Babus Basanta Kumar Bose, Joy Gopal Ghosha and Sailendra Nath Palit for the Appellant.

Babu Ashutosh Mukherjee for the Respondent.

The judgment of the Court was as follows :

This is an appeal against an order of the District Judge of Bhagalpore, dated the 2nd February 1906.

The facts of the case are these : The opposite party, respondent, obtained a decree for *wasilat* against the present appellant. The present appellant had made a claim to certain property, under section 335, Civil Procedure Code, and had got possession of the property. The present respondent had therefore to sue for possession and prove possession against the present appellant. He did so and obtained an order for *wasilat* : so that he was entitled to *wasilat* from the date of delivery of possession in the section 335 case up to the date of recovery of possession in his suit. There was an appeal to the District Judge ; but before the District Judge there was no discussion as to the question of *wasilat*. The appeal there was only as to the boundaries of the plots of which the present respondent was to recover possession. Now, the present respondent has applied for execution of his decree for *wasilat* ; and the contention of the appellant is that the lower appellate Court's decree does not give him *wasilat*. It is further urged that when the

* Appeal from Appellate Order No. 173 of 1903 against an order of F. S. Hamilton, Esq., District Judge of Bhagalpore dated the 2nd February 1906, reversing that of Babu N. L. Dey, Subordinate Judge, 2nd Court, of Bhagalpore, dated the 4th May 1906.

CIVIL.

1907.

Upendra Chandra
Singh
v.
Sakhi Chand.

present respondent did apply for *wasilat* he did not prosecute his application with diligence, and it was dismissed for default on the 25th January 1904: so that the present application of the 13th April 1904 is barred by limitation. The learned District Judge has overruled both these contentions and ordered that execution should proceed.

The judgment-debtor in the *wasilat* decree again appeals and urges that the District Judge is wrong.

We think, however, that there is no reason to interfere with the decision of the learned District Judge. It is clear that the present respondent did obtain a decree for *wasilat* and that decree was never interfered with nor was its correctness even impugned. The lower appellate Court, through inadvertence did not specially refer to the question of *wasilat*; but it is evident, beyond question, that the decree for *wasilat* was never meant to be interfered with. We think, therefore, that the respondent is entitled to execute his decree for *wasilat*.

Then it is urged that as the application for ascertainment of mesne profits was dismissed on the 25th January 1904, and he did not apply for a fresh ascertainment of mesne profits till the 13th April 1904, his application is barred by limitation, because it is urged, he was bound to apply within 30 days of the order of dismissal of the application, dated the 25th January 1904. The learned District Judge has, however, pointed out that the facts of the case of *Ram Kishore Ghose v. Gopi Kant Shaha* (1) are on all fours with those of the present case, and he says: "It is very plainly stated in the judgment of the Honourable Judges that the practice has always been to treat applications to determine mesne profits as applications for execution of the decree, and that the striking off of such cases does not finally decide them or prevent the decree-holder from making a further application for the determination of mesne profits. I cannot agree in the distinction drawn by the Subordinate Judge between dismissal for default and striking off."

We see no reason to dissent from this view, nor do we consider that there is any substantial distinction between an order striking off an application and one dismissing it for default.

We therefore dismiss this appeal with costs. The hearing fee is assessed at five gold mohurs.

B. M.

Appeal dismissed.

(1) (1900) I. L. R. 28 Calc. 242.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

SAILABALA DEBI AND OTHERS

v.

SRIRAM BHATTACHARYA AND OTHERS.*

CIVIL.

1907.

January, 22.

Occupancy holding, non-transferable, transfer of—Abandonment—Permissive possession of homestead land—Khas possession, suit for.

An occupancy raiyat sold his holding, which was not transferable by custom, and gave up possession to the purchaser of all the culturable lands of the holding and remained in possession of the homestead land only by permission of the purchaser :

Held, that was sufficient to indicate that the raiyat had abandoned his holding and he was liable to the consequences of such abandonment. The landlord is entitled to recover khas possession against the raiyat and the purchaser.

Appeal by the Defendants.

Suit to recover khas possession.

The facts of the case are as follows :

The defendants Nos. 3 and 4 sold the land to the defendant No. 1. The defendants No. 3 and 4 were tenants under the plaintiffs. After the sale, when the plaintiffs instituted a rent suit against the defendants Nos. 3 and 4, the said defendants put in a written statement stating *inter alia* that they sold the same to the defendant No. 1 under a deed of private sale, that the defendant No. 1 was in possession of the said land and jama and they were not liable to pay rent to the plaintiffs. Thereupon the plaintiffs withdrew their claim in the said suit, and instituted the present suit to recover *khas* possession of the land. They stated that as the defendants Nos. 3 and 4, had no right to sell the tenancy, they, by reason of the transfer, acquired right to eject the defendants from the lands.

All the defendants filed written statement and contended *inter alia* that the defendants Nos. 3 and 4, were raiyats holding at a rent fixed in perpetuity and, therefore, the transfer was a valid one and, alternatively, that if the holding was a non-transferable holding in which the defendants Nos. 3 and 4 had occupancy rights, still those defendants had not abandoned it because they remained in occupation of the homestead lands and, therefore, the plaintiffs were not entitled to *khas* possession, at all events against defendants Nos. 3 and 4.

Both the lower Courts held that the holding was a non-transferable holding, that defendants Nos. 3 and 4 sold it to defendants Nos. 1 and 2 and afterwards abandoned the holding and that, therefore, the landlords were entitled to recover possession. They accordingly decreed the plaintiff's suit. Thereupon the defendants preferred an appeal to the High Court.

* Appeal from Appellate Decree No. 1610 of 1905, against the decree of Babu Aditya Chandra Chakravati, Officiating Subordinate Judge of Jessore, dated the 6th May 1905, affirming that of Babu Hemendra Lal Singha, Munsiff of Magura, dated the 31st January 1905.

[*Bristeedhur Biswas v. Mudan Sirdar* (1883) I. L. R. 9 Calc. 648 and *Nadhu Mandal v. Kartick Mondal* (1903) 9 C. W. N. 56 distinguished—Rep].

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1907.

Sailabala Debi
v.
Sriram Bhattacharya

Babu Surendra Chunder Sen for the Appellants.

Babus Jadu Nath Kanjilal and Girja Prasanna Roy Chowdhury for the Respondents.

The judgment of the Court was delivered by

Brett, J.—The present appeal arises out of a suit brought by the landlords, plaintiffs, to recover khas possession of a certain holding which originally belonged to defendants Nos. 3 and 4 on the ground that that the holding was one in which they had rights of occupancy, but which was not transferable, and that defendants Nos. 2 and 3 had sold the holding to defendants Nos. 1 and 2 and had relinquished possession of the holding to them.

Both the lower Courts have held that the holding was a non-transferable holding, that defendants Nos. 3 and 4 sold it to defendants Nos. 1 and 2 and afterwards abandoned the holding and that, therefore, the landlords were entitled to recover khas possession. They accordingly decreed the plaintiffs' suit.

Defendants have appealed to this Court and in support of the appeal two points have been taken, *first*, that the holding was not one in which defendants Nos. 3 and 4 had occupancy rights only, but was one which they held at a fixed rent, and, therefore, it was transferable; *secondly*, that even if the holding was a non-transferable holding in which the defendants Nos. 3 and 4 had no occupancy rights, still those defendants had not abandoned it, because they remained in occupation of the homestead lands and therefore the plaintiffs were not entitled to khas possession, at all events against defendants Nos. 3 and 4.

The first point does not appear to us to arise on the findings of the lower Courts.

In support of the case for defendants Nos. 3 and 4 that the holding was one at a fixed rent, they relied on certain *dakhilas*. The Court of first instance found that these *dakhilas* were not genuine and the Court of appeal seems to have accepted that finding though the Judge goes on to say that even if the receipts were true, the defendants Nos. 3 and 4 would not be entitled to a finding in their favour based on those receipts, because the present suit being not a suit under the Bengal Tenancy Act the provisions of section 50 clause 2 would not apply.

As to the second point, we think that it is concluded by the findings of the lower Court.

It appears that after the sale by defendants Nos. 3 and 4 to defendants Nos. 1 and 2, the plaintiffs brought a suit against defendants Nos. 3 and 4 for rent and that defendants Nos. 3 and 4 in

their defence alleged that they had sold the entire jama to defendant No. 1 and that the defendants Nos. 3 and 4 had given up possession to him. The suit was in consequence withdrawn. We think that after that defence set up in the rent suit brought against them, it is not now open to the defendants to deny that they had parted with the possession of the holding. It seems, as the lower Court remarks, that since the sale, the defendants 3 and 4 have been allowed to remain on the homestead lands with the permission of the purchasers, but such permissive occupation of the homestead lands unaccompanied by cultivation or possession of the culturable lands, would not be sufficient to indicate that the defendants had not abandoned their holdings or to save them from the consequences of such abandonment. We have been referred to several cases in which it has been laid down by this Court, that where after a sale of a holding with a right of occupancy to a third party, the tenant remains in possession, even though he is in possession as an under-tenant of the vendee, still the landlord is not entitled to recover khas possession as against him. But the present case is clearly distinguishable from those cases, because the tenants, defendants, Nos. 3 and 4, have been found to have given up to the purchaser possession of all the culturable lands of the holding and to have remained in possession of the homestead lands only by permission of the purchaser. The two points urged in support of the appeal fail, and we accordingly dismiss the appeal with costs.

A. T. M.

*Appeal dismissed.**Before Mr. Justice Rampini and Mr. Justice Sharfuddin.*

MAHOMED MEHDI BELLA

v.

MOHINI KANTA SAHA CHOWDHURY AND OTHERS.*

Execution of decree—Limitation—Period of limitation, when begins to run—Original or Appellate decree—Code of Civil Procedure (Act XIV of 1882), Sec. 230—Decree modifying original decree.

Per Rampini J.—When an application is made to execute the decree passed on appeal, modifying the decree made in the Court of first instance, limitation begins to run from the date of the decree in appeal and not from the decree of the first Court, as it is not the decree sought to be enforced.

Per Sharfuddin J.—It is only the last decree that can be executed, and limitation would begin to run from the date of the appellate decree and not from that of the original decree.

* Appeal from Appellate Order No. 428 of 1906 against an order of H. Walmsby, Esq., Officiating District Judge of Dacca, dated the 9th June 1906, affirming that of Babu Tarak Chandra Das, Officiating Subordinate Judge, 2nd Court of that District, dated the 21st April 1906.

CIVIL.

1907.

Sailabala Debi
v.
Sriram Bhattacharya
Bratt, J.

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1907.

June, 5, 10.

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1907.

Mahomed
Mehdi Bella

v.

Mohini Kanta Saha
Chowdhury.

In cases where the original decree has either been set aside or modified that decree ceases to exist, and for the purposes of limitation, the date of the appellate decree should be taken into consideration, not the date of the decree that has ceased to exist.

In cases where the Court of appeal affirms the original decree, the general rule is to be followed and the date of the appellate decree affirming the original one is the date from which the period of limitation is counted.

Gopal Chanāra Manna v. Gosain Das Kalay (1) referred to.

Application for execution of decree.

Appeal by the Judgment-debtor.

The facts of the case appear from the judgment.

Babu Foy Gopal Ghosha for the Appellant.

No one appeared for the Respondent.

C. A. V.

The following judgments were delivered :

June, 10.

Rampini J.—This is an appeal by judgment-debtor No. 4. He contends that the decree which it is sought to execute against him is barred by limitation under section 230, Civil Procedure Code. The facts are that a decree was given against him for Rs. 480 on the 23rd August 1892. An appeal was preferred and a decree for Rs. 960 was on the 29th March 1893 passed jointly against him and the defendant No. 3. It is contended that as more than 12 years had elapsed between the 23rd August 1892 and the date of presentation of the present application for execution, execution of the decree is barred. The appellant's pleader relies on the words of section 230, in which it is said that execution is barred by the lapse of 12 years from the date of the decree sought to be enforced or the date of the decree on appeal "affirming the same."

The pleader's contention is that limitation cannot be held to run from the date of the decree in appeal in this case, because it did not affirm the decree of the lower Court. The answer to this would seem to be that it is the decree passed on appeal in this case it is sought to be enforced and not the decree of the first Court. Hence limitation runs from the 29th March 1893, and the present application for execution is in time.

The decree in appeal appears to have been rightly passed against the defendants 3 and 4 and cannot now be impugned.

We dismiss this appeal with costs.

Sharfuddin J.—The whole contention on behalf of the judgment-debtor appellant, rests on the question as to whether the decree-holder who is the respondent in the present appeal

(1) (1898) I, L. B. 25 Calo. 594 (F. B.)

can execute his decree against the appellant within 12 years from the date of the appellate decree in this case.

The original decree is dated the 23rd August, 1892 and the appellate decree is dated the 29th March 1893. The application for execution was admittedly made, within 12 years after the appellate decree and more than 12 years after the original decree.

The original suit was against four defendants and the appellant was defendant No. 4 in that suit. This defendant No. 4 was made separately liable for a sum of Rs. 480. The first and second defendants of that suit preferred an appeal against the decree. But the present appellant was made a party in that appeal. The appellate Court modified the decree by making the present appellant and the third defendant of the original suit jointly liable for the sum of Rs. 959 and this modified decree is dated the 29th March 1893.

It is urged on behalf of the present appellant that the period of limitation should be computed from the date of the original decree which is the 23rd August 1892, and that the application for execution having been made more than twelve years after this date, is barred.

The Subordinate Judge has held otherwise and I think rightly so, relying on the authority, viz., *Gopal Chunder Manna v. Gosain Das Kalay* (1).

It has been urged on behalf of the appellant that although under section 230 cl. (a), Civil Procedure Code, the 12 years' limitation is to be counted from the appellate decree, but that clause provides that the period can be so counted when the decree has been affirmed on appeal, and that in the present case the appellate decree has modified the original decree and hence the period of limitation should be counted from the original decree.

The rule of law is that it is only the last decree that can be executed and that limitation, therefore, would begin to run from the date of the appellate decree and not from that of the original decree.

In cases where the original decree has either been set aside or modified, that decree ceases to exist, and hence for the purposes of limitation the date of the appellate decree should be taken into consideration, not the date of the decree that has ceased to exist.

In cases where the Court of appeal affirms the original

(1) (1898) I. L. R. 25 Calc. 594 (F. B.)

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Sharfuddin, J.

decree, that Court allows the original decree to exist. And hence I think, the Legislature thought it necessary to provide that even in cases where the Court of appeal affirms the original decree the general rule is to be followed, and that the date of the appellate decree affirming the original one is the date from which the period of limitation is counted.

For the above reasons and for the reasons set forth in the judgment of my learned brother, I also consider that the present appeal should be dismissed.

Appeal dismissed.

Before the Hon'ble R. F. Rampini, Acting Chief Justice and Mr. Justice Sharfuddin.

SHEIKH JAMIR AND OTHERS

v.

SRIMATI LAL BIBI AND OTHERS.*

CIVIL.

1907.

August, 28.

Limitation Act (XV of 1877), Secs. 7, 8—Minority of one of several decree-holders—Extension of time.

Where one of several decree-holders is a minor, he can get an extension of time after the cessation of his disability and he may apply for execution of the whole-decree.

Burjo Kumar Dutt v. Arun Chundra Roy (1), Gorindram v. Tatia (2) and Zamir v. Sundar (3) followed.

Periasami v. Krishna (4) not followed.

Appeal by the Defendants.

Application for execution of decree.

The material facts and arguments appear from the judgment.

Babu Shib Chandra Palit for the Appellants.

Babu Ram Chandra Mazumdar for the Respondents.

The judgment of the Court was delivered by

Rampini C. J.—This is an appeal against an order of the District Judge of Hooghly dated the 7th February 1907.

The appellants are the judgment-debtors, and the order appealed against is an order allowing execution of the decree against them. The decree is dated the 10th December 1896.

* Appeal from Appellate Order No. 172 of 1907, against an order of F. B. Roe, Esq., District Judge of Hooghly, dated the 7th February 1907, affirming that of Babu Kali Prasanna Sen, Munsiff, Serampore, dated the 15th December 1906.

(1) (1901) I. L. R. 28 Calc. 465.

(2) (1905) I. L. R. 20 Bom. 383.

(3) (1899) I. L. R. 22 All. 199.

(4) (1902) I. L. R. 25 Mad. 481.

Reporter's Note: Please see clause 8 of the Indian Limitation Bill which adopts the view upheld in this case.

The judgment-debtors contend' that it is barred by limitation. But the decree-holder who now applies to execute the decree was a minor and he executes it within the period allowed by section 7 of the Limitation Act.

Then, it is said that the decree-holder can only execute the decree for his own share. But, according to the case of *Surja Kumar Dutt v. Arun Chunder Roy* (1) it is clear that he is entitled to execute the whole of the decree.

The pleader for the appellants contends that in the Full Bench case of *Periasami v. Krishna Ayyar* (2), a different rule has been laid down. But we are bound by the ruling of this Court, which, we observe, is supported by the cases of *Govindram v. Tatia* (3) and *Zamir Hasan v. Sundar* (4).

There seems to us to be no doubt, therefore, that the order of the District Judge is correct. The decree is one which the decree-holders can execute jointly and severally. The minor has a right to execute the whole decree and the provisions of the Limitation Act should be interpreted strictly and not allowed to defeat the rights of the decree-holders, unless it is clear that this should be done.

The appeal is dismissed with costs, three gold mohurs.

N. K. B.

Appeal dismissed.

(1) (1901) I. L. R. 28 Cal. 465.

(3) (1895) I. L. R. 20 Bom. 383.

(2) (1902) I. L. R. 25 Mad. 431.

(4) (1899) I. L. R. 22 All. 199.

Before Mr. Justice Rampini and Mr. Justice Pargiter.

HANUMAN PRASAD SINGH AND OTHERS.

v.

DEO CHARAN SINGH AND OTHERS.

Ejectment, suit for—Tenancies of homestead land—Tenancy created before the Transfer of Property Act—Abandonment or surrender—Notice to quit, if necessary.

Previous to the passing of the Transfer of Property Act, tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage.

Nabu Mondul v. Cholim Mullick, (1) and *Hari Nath Karmakar v. Raj Chandra Karmakar* (2) referred to.

Beni Madhab Banerjee v. Jai Krishna Mookerjee (3) and *Doorga Pershad Misser v. Brindabun Sookul* (4) distinguished.

* Appeal from Appellate Decree No. 340 of 1900 against a decree of Babu Jogendra Nath Ghose, Subordinate Judge, 2nd Court, of Bhagalpore dated the 8th December 1899, reversing that of Babu Pran Krishna Biswas, Munsiff, 1st Court, of Beguserai, dated the 1st May 1899.

(1) (1898) I. L. R. 25 Cal. 896.

(3) (1869) 7 B. L. R. 152.

(2) (1897) 2 C. W. N. 122.

(4) (1871) 15 W. R. 274.

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1907.

Sheikh Jamir

Srimati Lal Bibi.

Rampini, C. J.

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1903.

July, 1.

CIVIL,

1908.

Hanuman Prasad
Singh.v.
Deo Charan Singh.

Where there has been an implied surrender of the land, and the former tenant has abandoned the land and transferred it to another and no longer pays rent for it, the landlord is justified in regarding the conduct of the former tenant as amounting to an implied surrender and he is now entitled to take direct possession of it.

Nil Madhab Sikdar v. Narattam Sikdar (5) distinguished.

Suit for khas possession on ejectment.

Appeal by the Plaintiffs.

The facts of the case appear from the judgment.

Dr. Asutosh Mookerjee and *Babu Biraj Mohan Mojumdar* for the Appellants.

Dr. Rash Behary Ghose and *Moulvi Mahomed Yousuff* and *Syed Mahomed Tahir* for the Respondents.

The judgment of the Court was delivered by

Rampini J.—The facts of this case have been fully set forth in the numerous judgments which have been delivered in the course of it. It is unnecessary, therefore, to recapitulate them here. It is sufficient to say that the case was remanded to the lower appellate Court to decide, (i) the date of the creation of the tenancy in dispute, and (ii) whether there is any usage or custom in the district making a tenancy of this particular class transferable. The tenancy, it may be noted, is one of homestead land created for the purpose of habitation.

The lower appellate Court has now returned its findings on these two issues to this Court. The learned Subordinate Judge has found that the tenancy was created, at all events before the passing of the Transfer of Property Act, on the 1st July 1882; and that there is no evidence of any usage or custom in the district making a tenancy of this particular class transferable.

On these findings it appears to us that this appeal must be decreed and the plaintiff given a decree for the land in dispute as prayed for.

The learned pleader for the respondents contends, (i) that there is no evidence upon which the Subordinate Judge was justified in coming to the conclusion that there was no usage or custom in the district making a tenancy like the one in this case transferable; (ii) that previous to the passing of the Transfer of Property Act tenancies of the class in question were transferable and (iii) that the tenancy of Dukhu was not determined by notice to quit and, therefore, the plaintiff is not entitled to maintain this suit.

In our opinion there is no force in any of these contentions.

(5) (1890) I. L. B. 17 Calc. 826.

There is evidence on the record which justified the Subordinate Judge in coming to the finding that there was no usage or custom in the district making tenancies such as the one in this case transferable. It may be that he has not entirely believed all the evidence ; but there is evidence which, in our opinion, justified his finding.

As for the second plea, the learned pleader for the respondent relies upon the cases of *Beni Madhab Banerjee v. Jai Krishna Mookerjee* (1) and *Doorga Pershad Misser v. Brindabun Sookul* (2). It is unnecessary for us to say much with regard to these cases, because they have been considered and discussed and distinguished in the case of *Nabu Mondul v. Cholim Mullik* (3). It is pointed out in this case that the *ratio decidendi* of the two former cases was that in them there was proof of a custom of transferability. This case of *Nabu Mondul v. Cholim Mullik* (3) has been followed in another case, namely that of *Hari Nath Karmakar v. Raj Chandra Karmakar* (4) and the learned pleader for the respondent has not shown us any reason why we should not follow it, as has frequently been done.

The third plea of the learned pleader for the respondent is that the tenancy has not been determined ; and in support of this contention he cites the case of *Nil Madhub Sikdar v. Narattam Sikdar* (5). That case, however, was a very different case from the present. In that case the tenancy was of a permanent, *mourasi* character and all that was decided in it was that as the landlord did not, in those circumstances, reserve to himself the right of re-entry, he was not entitled to eject the defendant ; and the case went no further. In the present case, however, it is clear that there has been an implied surrender of the land in question. The former tenant has abandoned the land and transferred it to the present defendant. He no longer pays rent for it ; and in these circumstances we consider that the landlord was justified in regarding the conduct of Dukhu as amounting to an implied surrender and consequently he is now entitled to take direct possession of the land.

For these reasons we decree this appeal with costs.

B. M.

Appeal allowed.

(1) (1869) 7 B. L. R. 152.

(3) (1898) I. L. R. 25 Calc. 896.

(2) (1871) 15 W. R. 274.

(4) (1897) 2 C. W. N. 122.

(5) (1890) I. L. R. 17 Calc. 826.

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1903.

Hanuman Prasad
Singh.

v.
Deo Charan Singh.

Rampini, J.

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Holmwood.

MUSAMMAT HAFIZAN

v.

ABDUL KARIM.*

CIVIL.

1907.

November, 22.

*Civil Procedure Code (Act XIV of 1882), Secs. 380, 410—Pauper, suit by—
Security for costs.*

No security for costs ought to be demanded from a person who has been allowed to sue as a pauper. Section 380 of the Civil Procedure Code does not apply to the case of a person who has been allowed to sue as a pauper under section 410 of the Civil Procedure Code.

Rule obtained by the Plaintiff.

Suit for dower.

The material facts and arguments appear from the judgment.

Babus Baidya Nath Dutt and Chandra Sekhar Prasad Singh
for the Petitioner.

Moulvi Syed Shamsul Huda for the Opposite party.

The judgment of the Court was as follows :

The present Rule is directed against an order passed on the 13th July 1907 by the Subordinate Judge of Patna under the provisions of section 380, Civil Procedure Code, requiring the present petitioner to furnish security to the extent of Rs. 800 within a month for the payment of any costs incurred or likely to be incurred by the defendant in the suit which has been instituted by the petitioner. It appears that the petitioner who is a woman instituted a suit against the opposite party claiming to be entitled as his wife to a certain amount of money as dower, and that when she instituted the suit, she put in an application for permission to be allowed to bring the suit as a pauper. An enquiry was, in consequence, made into that application with the result that an order was finally passed under the provisions of section 410, Civil Procedure Code, granting the application and permitting her to prosecute the suit as a pauper. After that application had been granted, the application which led to the order which is the subject of the present Rule was put in by the defendant, the opposite party, asking the Court to require the petitioner under the provisions of section 380 to furnish security for costs. That application was supported by an affidavit which contains certain allegations to the effect that the woman was a person of immoral character, that she never was the wife of the

* Civil Rule No. 2480 of 1907 against an order of Babu Umesh Chandra Sen, Subordinate Judge of Patna, dated the 27th April 1907.

defendant and that she was supported in the case by two touts of the Patna Bar. In reply to that affidavit the petitioner filed a counter affidavit denying the truth of the allegations made in the defendants' affidavit and stating that she was not in a position to give security for the costs in the suit.

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The Subordinate Judge on a consideration of these two affidavits has recorded the following order: "Having carefully considered all the circumstances presented to me, I think I ought to exercise discretion in favour of the defendant. It is, therefore, ordered that the plaintiff do furnish security to the extent of Rs. 800 within a month. In default the suit will be dismissed with costs." After that order had been passed, the petitioner applied to this Court and obtained a Rule calling on the opposite party to show cause why that order should not be set aside.

In support of the application it has been contended, and we think fairly contended that the effect of the order passed by the Subordinate Judge under the provisions of section 380, Civil Procedure Code, is to render nugatory the order passed under the provisions of section 410 of the Code.

The learned vakil who has appeared in support of the application has invited our attention to the case of *Nusseeroodeen Biswas v. Ujjul Biswas* (1) and has pointed out that a similar view was taken by the learned Judges who tried that case, though that case was to a certain extent not quite on all fours with the present. In that case the order under section 380 had been passed with reference to an appellant who had been allowed to appeal as a pauper. And the learned Judges say in effect that to allow an order for security to be passed on such an appellant, would be practically to render nugatory the order passed allowing him to appeal as a pauper, and they go on to add, that in their opinion the provisions of the section of the Code then in force which corresponds with section 380 of the present Code were so inconsistent with the provisions of the Code dealing with suits and appeals by paupers as to, in their opinion, support the view that the provisions of section 380 were not applicable to suits or appeals brought by paupers. It has been argued on the basis of this decision that in the present case the Subordinate Judge in passing the order demanding security from the petitioner either exercised a jurisdiction not vested in him by law or acted in the exercise of his jurisdiction illegally and with material irregularity.

In support of the order it has been argued that the Subor-

(1) (1871) W17, R.88,

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dinate Judge was not prevented by the fact that the petitioner had been permitted to sue as a pauper from requiring security from her under the provisions of section 380, and the learned vakil has gone so far as to suggest that as the order for security is one within the discretion of the Subordinate Judge, we, as a Court of revision, ought not to interfere with it under the provisions of section 622, Civil Procedure Code. In our opinion this contention cannot prevail. The provisions of section 622 certainly give to this Court full powers to interfere, if we are satisfied that the lower Court has either exercised a jurisdiction not vested in it by law or has acted in the exercise of its jurisdiction illegally and with material irregularity. In this case, we think that the view which this Court took in the case on which the learned vakil for the petitioner relies is one which we should adopt, and that the provisions of section 380 cannot be taken to be applicable to the case of a person to whom permission has been granted under the provisions of section 410 to sue as a pauper. We think, therefore, that the Subordinate Judge, in passing the orders which he passed under section 380, Civil Procedure Code, and which had the effect of rendering nugatory the jurisdiction which he had exercised under the provisions of section 410 of the Code, acted in the exercise of his jurisdiction illegally and with material irregularity and that his order under section 380 of the Civil Procedure Code must be set aside.

In the present case the learned Subordinate Judge has refrained from giving his reasons for passing the order under section 380, but after reading the two affidavits, we think that the materials before him were not sufficient to justify that order. We, therefore, direct that the Rule be made absolute, and that the order passed under section 380 requiring the petitioner to furnish the security be set aside. The petitioner will recover costs of this proceeding from the opposite party. We fix the hearing fee at two gold mohurs.

N. K. B.

Rule made absolute.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Francis William Maclean, K. C. I. E., Chief Justice,
Mr. Justice Mitra and Mr. Justice Woodroffe.*

RAJESWAR MULLIK

v.

GOPESWAR MULLIK AND ANOTHER.*

Hindu Law—Shebaitship, whether alienable by will.

CIVIL.

1907.

December, 20.

Shebaitship is not alienable by will.

Manoharam v. Pranshankar (1) not followed.

Appeal by the Plaintiff.

The facts of the case necessary for this report are as follows :

This was a suit by Rajeswar Mullik against his brother Gopeswar Mullik and his nephew Gora Chand Mullik to have the rights of the plaintiff under the will of his uncle, one Lolit Mohun Mullik ascertained and declared. Gora Chand did not appear to defend the suit. The principal question in the case was as to the validity of clause 5 of the will of the said Lolit, whereby he directed as follows : " My wife Srimati Sudebi Moni Dassi shall on my demise take the money which I have been receiving for the expenses of services according to my turn . . . to Sri Sri Ishwar Radha Gobind Jeu established by my grandmother, the late Chitra Dasse and perform the said services during her lifetime, and I confer on my wife Srimati Sudevi Moni Dosse the same right that I now have to the Ishwar Jeu's jewellery, plate &c., and on her demise, I confer on my nephew Sriman Rajeswar Mullick Babaji the right &c., in respect of the expenses, jewellery etc., of the said service. He and his son and son's son etc., in succession shall enjoy by performing this service. The endowment, the shebait-ship of which was in question, was a private endowment, founded by Chitra Dasi, by an ekrar (agreement), dated 25th May 1820, a postscript, dated 27th February 1822 and her will dated 8th December 1842. The will of Lolit Mohun was made in 1891 but his widow did not die till 1906.

Mr. Justice Chitty held that the intention of the founder was that all her lineal descendants should hold the *debutter* property and jointly perform the *sheba* (worship, &c.). Under the circumstances the property and right of worship may be regarded as being in the first place hereditary, unless that is modified by

* Appeal from Original Decree No. 33 of 1907 against a decree of Chitty J. in Original Suit No. 836 of 1906 on the Original Side of the Court.

(1) (1882) I, L. R. 6 Bom. 298.

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usage of the family. His lordship was of opinion that the plaintiff had not proved such usage and dismissed the suit [*Rajeshwar Mullick v. Gopeshwar Mullik* (1)]. The plaintiff appealed.

Mr. Garth (with him *Mr. B. Chakravarti*) for the Appellant : Although originally the alienation of shebaitship was prohibited by the Hindu law, the authorities show that the right of partition of shebaitship has been frequently recognised. Alienation also has been allowed. I strongly rely on the cases of *Mancharam v. Pranshankar* (2) which is a case of alienation by will, *Rajaram v. Ganesh* (3), *Sitaram Bhat v. Sitaram Ganesh* (4). In this case the alienation by Lalit was to a member of the family and not to a stranger. See, *Khetter Chunder Ghose v. Hari Das Bundopadhya* (5).

Mr. S. P. Sinha (with him *Mr. B. C. Mitter*) for the Respondent was not called upon.

The judgment of the Court was as follows :

Maclean C. J.—The question which arises on this appeal is a very short one ; and, I think it may be properly stated thus, whether Lalit Mohan Mullick, who was the shebait of a certain idol was entitled to deal with it by his will as he purported to do.

It appears that the endowment of the idol was created many years ago by the will of one Chitra Dasi, and eventually the said Lalit Mohan became *shebait*. He purported to bequeath by this will the shebaitship after his death, first to his widow and then to his nephew Rajeswar Mullik, the present plaintiff. Lalit Mohan died, and Rajeswar now brings this suit to have it declared that he is entitled to the shebaitship. He is opposed by his brother Gopeswar Mullik, who says that Lalit Mohan had no power to bequeath the shebaitship by his will. That is the whole question in the suit.

No doubt, there are cases and authorities for the proposition that a *shebait* may by an act *inter vivos* alienate the shebaitship ; but I think I am fairly stating the result of those cases, when I say, that such alienations are not regarded with much favour, and that somewhat special circumstances must exist to support them. I need not go through the authorities which I think substantiate that proposition. But all of them relate to alienations *inter vivos*

(1) (1907) I. L. R., 34 Calc., 828. (3) (1898) I. L. R. 23 Bom. 131.

(2) (1882) I. L. R., 6 Bom., 298. (4) (1869) 6 Bom. H. C. R. (A. C. J.) 250.

(5) (1890) I. L. R. 17 Calc. 557.

and with the exception of one authority to which I will refer in a moment, there is none for the proposition that a *shebait* can by his will bequeath the shebaitship. On principle, I do not see how he can do so ; for the question at once arises, what has he to bequeath or alienate under his will. A *shebait* is a manager or a quasi trustee for the benefit of the idol. His office endures only for his life : his will only comes into operation on his death. What is, there then for him to alienate by his will ? Nothing. In the case of *Mancharam v. Pranshankar* (1), on which the learned counsel for the appellant relies, the alienation no doubt was by will : but the learned Judges seem to have proceeded on the view, that because in certain cases there may be an alienation by *shebait* by act *inter vivos*, so equally, there can be an alienation by a *shebait* by his will : But the distinction is obvious. There is nothing to pass under the will, but there is something which can pass by an alienation *inter vivos*, viz., the then existing interest of the *shebait*. I am, therefore, with great respect, unable to concur in that decision. I think that there was nothing which Lalit Mohan could pass by his will so far as relates to the shebaitship. As the title of the plaintiff is dependent upon this supposed alienation by Lalit Mohan, his case must fail.

Then it is suggested, that there is some usage in the family relating to the particular worship of this idol and to the shebaitship which would justify the alienation by will. I do not think that is made out. The learned Judge of the Court of first instance did not think so. It appears from the proceedings in this case, that attempts have been made from time to time by certain members of the family to deal with this shebaitship by will. It is clear from the terms of the decree dated the 26th of August 1882, referred to in the proceedings, that the alienation thus made by will failed. It is suggested that, that was a case of alienation made by a will to a stranger. That may be so, but the alienation in fact failed. As regards the other cases which are referred to, they seem to have been cases in which the bequest, if I may rightly so call it, was to those who would have been the shebaits in the ordinary course of descent. Consequently, there was no object in challenging the will. On this point, I do not think any usage or established practice in the family has been made out to justify the alienation.

In my opinion, the view taken by the Court of first instance is right and this appeal must be dismissed with costs.

(1) (1882) L. L. B. 6 Bom. 298.

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Mitra J.—I am of the same opinion. The case is one of hereditary shebaitship both under the will of Chitra Dasi and under the general law. The status of Lalit Mohun was that of a *shebait*, and as such he was in the same position as a manager of an infant heir. He had no power to alienate except for necessity or clear benefit to the *thakur*. No case of necessity or benefit to the *thakur* has, however, been pleaded or attempted to be made out by the evidence. The evidence of a family usage as giving the power to bequeath shebaitship by will is also very meagre. Lalit Mohun's right to manage as a *shebait* must cease with his death, and he had, in fact, nothing to bequeath.

Woodroffe J.—I agree that Lalit Mohun could not alienate the office of shebaitship by will. I wish to express no opinion on the question whether the office of shebaitship may be alienated by transaction *inter vivos* or, if so, under what conditions, and I think that the question of usage does not affect the matter which is now before us. I agree that this appeal should be dismissed with costs.

Messrs. G. C. Chunder & Co. :—Appellant's Attorney.

Messrs. Rutter & Co. :—Respondent's Attorney.

S. C. R.

Appeal dismissed.

PRIVY COUNCIL.

P. C.

1907.

November, 4.
1908.

January, 24.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

BAIJNATH GOENKA, LEGAL REPRESENTATIVE OF
MAGNIRAM MARWARI, DECEASED

v.

RAMDHARY CHOWDHURY AND OTHERS,

AND

DEO NANDAN PERSHAD, LEGAL REPRESENTATIVE OF
JOWHURI LAL, DECEASED

v.

RAMDHARI CHOWDHURI AND OTHERS.

[ON CONSOLIDATED APPEALS FROM THE HIGH COURT OF JUDICATURE
AT FORT WILLIAM IN BENGAL.]

Mahomedan Law—Pre-emption, when should the necessary claims be made, effect of unreasonable and unnecessary delay—Delay, a question of fact—Action to enforce a right of pre-emption—Mortgage—Redemption of the same by the purchaser from the plaintiffs as mortgagees—Effect of such redemption on the plaintiffs' right to pre-empt.

The right of pre-emption must be exercised, and the claims necessary to give

effect to it must be made, with the utmost promptitude, and any unreasonable and unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case.

Magni Ram and Jowhuri Lal, the plaintiffs, were owners in equal shares of 12 annas of certain properties comprised in a certain *taluka*. The remaining four annas belonged to the defendant Anupbati, who sold those four annas to the defendant Nirbhoy. Magni and Jowhuri brought suits and claimed the right of pre-emption against that sale. The two plaintiffs had obtained a transfer of a *zurpeshgi* mortgage binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the mortgage money in Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; and after some hesitation the two plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption. Their Lordships could not agree with that contention and

Held, that until a decree for pre-emption was made, Nirbhoy owned the land as purchaser, and had a right to redeem; and that the taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than that, and was quite consistent with the claim to pre-empt.

The consolidated appeals from two decrees of the above-mentioned High Court (Rampini and Pratt JJ., both dated January 20th., 1904) reversing two decrees of the Court of the Subordinate Judge of Monghyr (both dated March 31, 1900) and dismissing the appellants' suits.

The main question raised on the appeals was whether the appellants were entitled to pre-empt a 4 anna share in certain properties sold on December 17, 1897, by Anupbati Koeri (respondent No. 2.) to Nirbhoy Chowdhury (original defendant No. 1) who died *pendente lite* and was represented by respondent No. 1 and others.

The two suits were analogous and had been tried together at the instance of the parties. It was admitted that both suits would be governed by one judgment.

One Maharaj Singh was the original owner, of Taluka Rasulpur Bhatowni consisting of two separate *puttis*. On March 3, 1873 he divided that *taluka* equally between his two sons Jugal Pershad Singh and Kamla Pershad Singh, who became the owners in possession, each of an 8 anna share.

In or about the year 1884 Jugal Pershad mortgaged his 8-anna share to Jowhuri Lal and Magni Ram (original plaintiffs and appellants, deceased). On his death his widow Rajbati acquired his estate by right of inheritance. Suits for sale of the mortgaged property were brought against her and on April 2, 1889, decrees were made in favour of the mortgagees. In execution of

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Bajinath Goenka

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Ramdhari Chowdhury

and

Deo Nandan

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those decrees the 8 anna share was on January 12, 1891, purchased by the appellants who thus became owners each of a 4 anna share and obtained possession thereof.

Kamla Pershad died leaving him surviving two widows, Sundarbati and Anupbati (respondent No. 2), who acquired their husband's 8 anna share in the *taluka*. In order to pay their husband's debts they borrowed Rs. 63,000 from the Ulas Babus, and executed a *sudbharna potta* in their favour on January 10th, 1883, mortgaging their 8 anna share. The usufructuary mortgagees remained in possession of that share. Sundarbati in order to liquidate the mortgage debt, sold her 4 anna share in the *taluka* to the appellants, a 2 anna share to each under two separate *kobalas* dated July 9, 1897, receiving for the two sales an aggregate consideration of Rs. 40,000. The appellants deposited in Court the entire *sudbharna* debt, Rs. 63,000, and redeemed the mortgage and obtained possession of the entire 8 anna share which belonged to the two widows, with the exception of certain small share in a certain mouzah.

On December 17, 1897 Anupbati sold her 4 anna share (subject to certain minor reservations) to Nirbhoy Chowdhury.

On June 30th., 1898, the appellants instituted the present suits in the Court of the Subordinate Judge of Monghyr. The plaintiffs alleged that the appellants, who were shareholders in the *taluk*, were willing to purchase Anupbati's share. But she sold the same as already stated without their knowledge and consent. The appellant Jowhuri Lal, in the first suit came to know of the sale for the first time on December 20th., 1897, and he at once performed the ceremony of *talab-mowa-sibat* (immediate demand) on that day. The appellant Magni Ram in the second suit returned to Monghyr from Benares on January 5th., 1898, and learnt for the first time about the sale in question on that day, and at once performed the ceremony of *talab-mowa-sibat* on the same date. Both appellants then caused the ceremony of *talab-istishad* to be performed by their respective agents at the residence of the purchaser, defendant Nirbhoy Chowdhury, at Maheshpur, on January 7th., 1898, and on the property sold, and at the residence of the vendor Anupbati at Bhat Khund on the 11th and 12th of that month. The appellants pleaded that Rs. 44,850, the amount entered in the sale deed as the consideration was not actually paid. The relief sought was a decree for pre-emption on payment of the true consideration as determined by the Court.

The defendant Nirbhoy Chowdhry in his written statement filed on September 1st, 1898, denied that December 20th, 1897 and January 5th, 1898 were respectively the earliest dates on which the appellants had obtained information of the sale. He pleaded *inter alia* that the appellants had previously known and acquiesced in the negotiations and agreement and execution of the sale deed ; that the formalities required by the Mahomedan Law were not carried out at the proper time and place ; that the appellants induced Anupbati's co-widow to sell to them her 4 anna share by promising to pay to her any excess price which Anupbati might obtain ; that they refused to purchase Anupbati's share for a higher price than Rs. 36,000 and that they were never ready and desirous to purchase the same at a proper price. He also denied that the consideration set out in the deed of sale was not paid in fact.

The respondent Anupbati also filed her written statement in both suits to a similar effect. She further alleged that the appellants while refusing to raise their price said, "that if any other person was willing to pay a higher price, this defendant should sell to him" and that on account of this refusal, she sold to Nirbhoy Chowdhry for Rs. 44,850 the proper price, the appellants all along declining to buy and endeavouring to prevent a purchase by Nirbhoy Chowdhury or any other person. The defendant third party Magni Ram, in the first suit was the plaintiff in the 2nd. suit and the plaintiff in the first suit was the defendant third party in the 2nd. suit. After the institution of the suits, the appellants on September 13th., 1898, withdrew from Court the amount of the *sudbharna* debt deposited by Nirbhoy Chowdhury, on July 2nd., 1898, on account of the share of his vendor Anupbati, and gave up possession over the property in suit. The plaints were accordingly amended at the instance of the appellants. Of the nine issues fixed by the Subordinate Judge it is necessary to mention here only the following.

3. When was the plaintiff aware of the purchase by defendant 1st. party ?

4. Whether the ceremonies *talab mawasibab* or *talab istishad* were duly and legally performed and were bona fide ?

5. Whether plaintiff had notice of and gave consent to the defendant 2nd. party's selling the property in suit, if she got a higher price than Rs. 36,000 ?

6. Whether plaintiff's right of pre-emption has been lost by reason of his gross negligence and is he estopped from claiming the same ?

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7. For what price was the disputed property sold to the defendant first party, and what consideration did he actually pay for the property?

On March 31st., 1900, the Subordinate Judge delivered his judgment. He found that the appellant Jowhuri Lall was first informed of the sale in dispute on December 20th., 1897, and that the appellant Magni Ram on January 5th. 1898, and that both the appellants immediately on receipt of the information declared their intention to claim pre-emption and thus duly carried out the formality of the *talab-i-mowa-shibat*. He also decided that the other formality of the *talab-istishad* had also been duly performed and without unreasonable delay. He also held that the actual consideration for the sale was Rs. 37,000 and that the appellants were not estopped by their conduct from asserting their right to pre-emption. In the result, he made a decree in favour of each of the appellants for pre-emption of one-half of the property sold on payment of one-half of the sum of Rs. 37,000. The following passages are taken from his judgment :

"In both suits, I therefore, find that *mowashibat* was duly performed by the plaintiffs, and that there is no legal defect in such performance."

I now come to the evidence bearing upon the performance of the next ceremony, *talab-istishad* by the plaintiffs. There is no difference in dates regarding the performance of this ceremony between the two plaintiffs. The main objection urged by the learned pleader for the defendants on this subject is, that there was unreasonable delay in the performance of this ceremony by the plaintiffs. He contends that the plaintiffs became aware of the sale on the 19th. December 1897, when the mortgage debt due to them by Anupbati was tendered to the plaintiffs and they refused to accept the amount tendered. Now, I have already stated that the assertion of the tender of the debt to the plaintiffs on the 19th. December 1897 is not correct. That being so it remains to be seen whether there was any unreasonable delay and gross negligence on the part of the plaintiffs in performing the *talab-istishad*. It appears from the evidence of the plaintiff's side that the disputed *kobala* was executed on December 17th. 1897 at Gogri, and registered there on the following day, that on the 20th. of that month, plaintiff Jowhuri Lall received news of the sale, and immediately performed the ceremony of *mowashibat*; that on the 21st of that month, Jowhuri Lall sent a man to his

tahsildar Rambaran Lal, who resided at some place near Gogri, to take a copy of the *kobala*, but as the Sub-registry office at Gogri, was closed from 21st. to 26th. of that month, on account of the Christmas holidays an application for copy was made on December 27th and the copy was ready on the 29th and actually delivered on the 30th of the month. It further appears that Rambaran Lal sent the copy to Jowhuri Lal by post in a registered cover on the 31st, and the cover reached the Monghyr Post Office on January 2nd, 1898. The post peon, to whom the cover was made over for delivery to the addressee Jowhuri Lal, has been examined as a witness by the defendants. He states that he went to deliver the cover to Jowhuri Lal on the 2nd January and could not find him at his house. But this statement seems to be incorrect, for the 2nd was Sunday and, therefore, under the postal Rules, no registered cover could have been delivered to the addressee on that day. The peon must have, therefore, gone to Jowhuri Lal's house for delivering the cover on January 3rd, but he was not at home on that day, and so it was delivered to him on the 4th. On the 5th January plaintiff Magni Ram returned to Monghyr from Benares, and on receipt of the news of the sale in question, at once performed the ceremony of *talab-mowasibat*. On the 5th Magni Ram went to Mr. Scott a Barrister-at-law practising in the local Courts, to take his advice for getting police escort for sending the purchase money, Rs. 44,850 to the residence of the defendant Nirbhoy Chowdhury at Mahishpur. He thought that the money was required to be tendered to Nirbhoy Chowdhury under the Mahomedan Law, but although his impression was erroneous, yet the tender of the money was, as explained by the plaintiffs' pleader, necessary before the defendant No. 1 could be called upon to execute a *kobala* of the property sold. Be that as it may, the conduct of the plaintiffs in seeking legal advice for securing police help in sending the purchase money on behalf of each of them to Mahishpur which is about 7 miles off from Monghyr is perfectly *bona fide*, and it cannot be construed to be an act of wilful negligence on their part. On January 5th, Mr. Scott was said to be very busy when Magni Ram called on him. On the night of that day, Mr. Scott advised Magni Ram's servant Megh Raj to apply for police guard to escort the money to Mahishpur. On January 6th, the application was made on behalf of both of the plaintiffs to the District Superintendent of Police, at Monghyr and an order for police guard was made. On January 7th, the agents of both plaintiffs

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accompanied by other persons on their behalf and police guard, started for Mahishpur and performed the ceremony of *istishad* at the residence of defendant Nirbhoy Chowdhury, who as appears from the evidence, fled inside his house on seeing the party coming there. On January 10th the agents of the plaintiffs and other men on their behalf started from Monghyr for going to the villages of which the share had been sold, and to Bhatkhand where Anupbati used to reside. On January 12th, the ceremony was performed by them at the residence and in the presence of Anupbati on the 11th and 12th the same ceremony was performed by the party in question in the villages. Here I should add, that on the 8th January, the party had to arrange for conveyance and as the 9th was a Sunday, there was no steamer service from Monghyr to Gorgi on that day. This explains the delay for those two days. On the whole, I am perfectly satisfied with the evidence adduced by the plaintiffs that the ceremony of *istishad* was duly and properly performed by proxy Ganesh Lal, who performed the ceremony on behalf of Jowhuri Lal, being his am-mukhtear and agent, and Latafat Hassim, who performed the ceremony on behalf of plaintiffs Magni Ram, being his agent. There was also some certified mukhtears and pleaders amongst the party deputed by the plaintiffs for performing the ceremony. I further find that there was no unreasonable delay, or any act of gross negligence on the part of the plaintiffs in the performance of this ceremony. The evidence adduced by the defendants on this point, is to my mind, not at all worthy of credit. This issue is, therefore, also decided in favour of the plaintiffs.

" I now propose to deal with the 5th and 6th issues together. It is quite clear from the evidence on both sides that both Sundarbati and Anupbati first negotiated with the plaintiffs for the sale of their shares, and that the plaintiffs offered Rs. 36,000 for each of these shares. But I think there is no satisfactory evidence to show that they positively declined to make the purchase, or that they told Anupbati to sell her share to anyone she liked, for a higher price. Of course the plaintiffs were perfectly free to make the best bargain they could and their attempt to reduce the price cannot amount to fraud. It appears that the negotiations with the plaintiff fell through on account of their being a difference in the price claimed, and the price offered. The Mussammats then opened negotiations for sale with Rai Suraj Narayan Singh Bahadur, but during the period that was going on Sundarbati sold her share to the

plaintiffs, and thereupon Rai Suraj Narayan who is a well-known pleader of the Bhagulpur District Court, and knew the Mahomedan Law of the pre-emption throughly declined to purchase Anupbati's share. After that, it is alleged by the defendants, Aunpbati again opened negotiations for sale with plaintiffs. The plaintiffs deny this allegation, and I think the allegation is not satisfactorily proved. There is some difference between the allegation in the written statement of the defendants and the evidence adduced by them on this point. In the written statement, it is alleged that Anupbati herself came to Monghyr to reopen the negotiation with the plaintiffs, but the evidence adduced is to the effect that she did not do it herself, but sent her relation Jadubir to do it. It also looks somewhat inconsistent why Anupbati should reopen the negotiation with the plaintiffs when she had previously refused to sell her share to them for Rs. 36,000 which they offered. On the whole, I think, this allegation of the defendants is not true, and that the evidence adduced in support of it is not reliable. There is also no satisfactory evidence of the assertion that the sale by Anupbati was effected with the knowledge and the consent of the plaintiffs, tacit or express.

"Then as to the plea of estoppel by conduct, I find in the first place, that there is no reliable evidence to show that the defendants first party was induced by the plaintiffs to buy the property in dispute, and that they waived their right of pre-emption by any act on their part."

"The Mahomedan Law is that the waiver and relinquisher on the part of a pre-emptor must take place after and not before the sale. In these cases, no such thing is alleged or proved. The equitable doctrine of estoppel, embodied in section 115 of the Indian Evidence Act is not applicable here, because there is no proof of the facts that the defendant first party was induced by the plaintiffs to make the purchase, or that the defendant second party was influenced by them to sell to defendant No. 1. Both these issues are, therefore, found against the defendant.

"7th issue—The kobala of the 17th December 1897, purports to have been executed for a consideration of Rs. 44,850. The plaintiffs allege that Rs. 5,330, which is said to have been paid to Ganpat, Rs. 2,520 which is said to have been paid to Karman Mahton out of the consideration money, on account of debts due to them by Anupbati, was not actually paid. It is further asserted on the part of the plaintiffs that the sum of Rs. 1,000 out of Rs. 1,466-4-6, which is said to have been paid in cash to

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Anupbati out of the purchase money, was not actually paid. With the exception of these 3 items the rest of the consideration money was admittedly paid. I shall, therefore, examine the evidence bearing up the 3 items in dispute. Now Ganpat and Karman appear to be relatives of defendant first party. They have given their evidence in these cases and have produced their account books. Some of these books look very suspicious, specially those produced by Ganpat. They have evidently been made to look old, the paper being clearly soaked in water to give them an old appearance. The debts due to Ganpat and Karman are not secured by any registered deeds. The debts are no doubt heavy. Anupbati's share was mortgaged along with Sundarbat's share in the *taluka* to the Ulas Babus, under a *Sudbharna pottah* (Ex 4), the amount advanced was Rs. 63,000. In that state of things no money-lender would advance money to Anupbati upon mere *khata bahis* and *chittis*, as is alleged to have been done by Ganpat and Karman. I also fail to understand why Ganpat kept with him the old *chittis*, when they were renewed by new ones. I further find that at the time of the execution of the *kobala* in question, no account was made of the debts due to Ganpat and Karman. Considering, therefore, all these circumstances, and the unsatisfactory nature of the evidence adduced to prove these debts, I find that the debts were not actually due by Anupbati and are mere illusory, and that the payment of such debts is altogether false. These debts amount to Rs. 7,850. The payment of this amount out of the consideration is, therefore, not established. Then as to the remaining payment of Rs. 1,000, out of Rs. 1,466-4-6 paid in cash to Anupbati, I find that this was an actual payment. Anupbati admits the receipt of this amount in her evidence taken by commission. The other evidence bearing upon this point is unreliable, and I am not prepared to reject it altogether. There has been a good deal of discussion on both sides regarding the market value of the property sold, but I don't think it necessary to enter minutely into the evidence bearing upon it. All that I have to observe on the point is, that the price actually paid was Rs. 37,000 only and this amount represents also the market value of the property sold. So there is no improbability regarding the actual payment of this amount as price of the property sold."

Against the decrees of the Subordinate Judge, Nirbhoy Chowdhury appealed to the High Court of Judicature at Fort William in Bengal. The High Court delivered its judgment on

January 20, 1904. It decided that *talab-i-mowshibat* and the *talab istishad* were performed as alleged but was of opinion that the appellants were precluded from claiming pre-emption, because they had not made *talab istishad* with the least practicable delay. The High Court was also of opinion that the full amount of consideration as stated in the deed of sale had been paid by the vendee to the vendor, and that the appellants had waived their rights of pre-emption. In accordance with the above findings the High Court made decrees reversing the decrees of the Subordinate Judge and dismissing the suits with costs. Judgment of the High Court contained the following :

"Subordinate Judge in his judgment has shown that there is ample evidence with regard to the performance of the *talabi-mowasibat* by both plaintiffs as soon as they heard of the actual sale to the defendant No. 1, and we do not think we need say more on this point than that we agree with him as to the performance of all the necessary formalities, and that the *talab-i-mowasibat* is not vitiated by the plaintiffs not having specified the names of all the villages they claimed the right to pre-empt. The Subordinate Judge has given in his judgment sufficient reasons for coming to the conclusion he has arrived at in respect of this part of the case. The formalities required for the *talab-i-istishad* were also we think duly performed. But we are unable to agree with the Subordinate Judge in his view that it was performed with the necessary promptitude. It is clear that it is absolutely essential that this formal demand of the right of pre-emption should be made "with the least practicable delay" (16 W.R.F.B. 13 : Wilson's Digest, Art. 375 (2) page 412) and in our opinion it was not so performed. The plaintiff Jowhuri Lall heard of the sale to the defendant No. 1 on December 20, 1897, and the plaintiff Magni Ram heard of it on the 5th January 1898. But neither of them went to defendant's house and performed the *talab-i-istishad* until January 7, 1898. Now, the plaintiff Jowhuri Lal explains that he was engaged during the time in getting a copy of the deed of sale and in making arrangements for a police guard for the conveyance of the money which he tendered to the defendant No. 1 when he performed the *talab-i-istishad*. The plaintiff Magni Ram excuses his delay by saying he was absent in Benares up to January 5th and that he could not go to defendant No. 1's house on January 6th as he was afraid to go without the protection of the police and so his agent proceeded there, as soon as he got a police guard, which

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was, when the agent of the plaintiff Jowhuri went to the defendant's house. But we do not consider these excuses satisfactory. The evidence discloses the fact that there was considerable and certainly sufficient delay to invalidate the *talab-i-istishad* on the part of both plaintiffs. The plaintiff Jowhuri Lal instructed his agent Ram Baran Lal to procure a copy of the deed of sale. Ram Baran Lal went to the Registry office at Gogri, where the deed was registered, on December 21st, 4 p. m. The office was then closed, as it would naturally be, for 4 o'clock p.m. is after office hours. The witness states he went again on December 27th. The Subordinate Judge observes that this delay was due to the fact that office at Gogri was closed from 21st to 26th December. But this was not so. There is no evidence to this effect. We have been referred to a list of the Executive Christmas holidays published by this Court for the year 1897. From this list it appears that there were Executive holidays on the 24th, 25th, 26th December only. There was, therefore, an unnecessary delay of at least 3 days in making the *talab-i-istishad*, which is fatal. But that is not all. The postal peon Har Lal Mandar deposes that he took the envelope containing the copy of the deed of sale to the plaintiff Jowhuri Lal on the 2nd January. The Subordinate Judge remarks that this cannot be correct, for 2nd January 1898, was a Sunday, when registered letters are not delivered. But this does not seem to be a sufficient reason for considering that the peon did not take the letter to the plaintiff Jowhuri on the 2nd January. But, even if this conclusion be correct and that the postal peon did not go on the 2nd January but on the 3rd, there was still delay on the part of the plaintiff, for the peon says he went twice and tendered the letter to the plaintiff and twice the plaintiff refused to take it and told him to take it away and bring it back and he would take it "after thinking over for some time." The plaintiff according to the peon only received the letter the third time it was tendered to him, that is at 4 o'clock, p.m. on January 4th, so that there was clearly at least two days' delay in the receipt by the plaintiff Jowhuri of the registered copy of the deed of sale. The plaintiff was evidently during these two days trying to gain time for reflection. Then the plaintiff Jowhuri Lal was according to his own showing in possession of all the information he required for the *talab-i-istishad* on January 4th by 4 o'clock p.m. But the *talab-i-istishad* was not made on his behalf till the 7th January, though the purchaser's house was at a distance of only 7 miles. He ex-

plaints that he was engaged during this time in consulting a Barrister named Mr. Scott as to how he should procure a police guard, and in procuring a police guard and this is also the excuse given by the plaintiff Magni Ram for his delay from the 5th to 7th January. But it is unquestionable that this was an unnecessary delay. It is not necessary according to the Mahomedan Law to tender the money at the time of making *talab-i-istishad* so there was no necessity for any police to guard the money. Besides, the agent of the plaintiff Magni Ram took his money in notes ; which he could carry on his person so in this case the police guard was doubly unnecessary. The cases of both plaintiffs must, therefore, fall to the ground. This being so, it is strictly speaking, unnecessary for us to consider the other grounds for appeal.

But we would wish to record that we are further unable to agree with the findings of the Subordinate Judge that there was no waiver on the plaintiffs' part of the right of pre-emption and that the price paid for the property was not Rs. 44,850 but only Rs. 37,000.

"In the first place, the evidence adduced by the defendant convinces us that the plaintiffs were throughout endeavouring to purchase the property at as low a price as possible, that they offered Rs. 36,000 and would give no more, and that their agents told the defendant Anupbati and her nephew Jadubir that they would give no more and that if Anupbati would not accept Rs. 36,000 she was at liberty to sell the property to whom she pleased, Anupbati failed in her negotiations with the pleader Surja Narayan and again tried to induce the plaintiff to give more. She then sold to the defendant Nirbhoy. The plaintiff Jowhuri Lal was well aware of these negotiations. It is in evidence that he was informed of Anupbati's overtures to Nirbhoy Chowdhury and that he engaged a pleader, also named Jowhuri Lal, to go to Ramdhari, the son of Nirbhoy Chowdhury, to persuade him not to buy the property, so as to force Anupbati to sell to the plaintiffs at their own price. This leads us to believe the witnesses who depose that the plaintiff's agents told Anupbati that she was at liberty to sell to another at a higher price, if she could get it. The plaintiff Jowhuri Lal did not expect she would be able to do so. He endeavoured to frustrate her attempts to sell for a better price and certainly never after becoming aware of her negotiations to sell to Nirbhoy, came forward and offered to buy at the price that Nirbhoy was

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willing to give or warned her that he intended to exercise his rights of pre-emption, if she did succeed in selling to another (*See Brojo Kishore Sarma v. Kirti Chandra Sarma* (1), *Saral Kumar v. Ashhee* (2), *Kuldip Singh v. Ramdin Singh* (3) and *Bhaoran Singh v. Lalman* (4).

"Then we see no reason for supposing that the price paid was not Rs. 44,850 but only Rs. 37,000. The Subordinate Judge finds the 2 debts of Rs. 5,330 and Rs. 2,520 alleged to be due to persons named Ganpat and Karman were illusory and not real debts. We are not of this opinion. The debts have been proved to our satisfaction. Ganpat, Karman and other witnesses have deposed to them. They produce their books, both recent and of earlier date, in which these debts are entered. Some of these books have gone through several rainy seasons. One witness explains that the roof of the house in which they were kept fell in and so they got damp. We see no reason to disbelieve this story. At any rate they do not appear to have been soaked in water, as the Subordinate Judge is of opinion they have been, to give them an old appearance. On the contrary they appear to be genuine old books and we believe in the existence of the debts in proof of which they have been produced. But whether these debts were real or illusory we are convinced that the defendant No. 1 paid Rs. 44,850, to Anupbati and that she received this sum from him. If she only received Rs. 37,000 which exceeds by but a trifling amount what the plaintiffs had offered to her, it seems most probable that the plaintiffs would have bought the property and that there would have been no occasion for these suits. It was because Anupbati would not sell for Rs. 36,000 or any sum approaching that amount, but wanted much more, so as to clear her of her liabilities that the negotiations with the plaintiffs were broken off and that she sold to defendant No 1 for Rs. 44,850. Even this sum appears an inadequate price for the properties sold, as Ramdhari, the son of Nirbhoy, deposes that they are worth not less than Rs. 50,000.

"In these circumstances we do not think we need discuss any other of the grounds of appeal raised by the appellants : We would only remark in conclusion there is in our opinion no force in the plea that the plaintiffs ratified the sale to the defendant. They may have accepted small sums out of the purchase money in payment of debts due to them but they never intended we consider, to ratify the sale, nor can their act be regarded as amounting

(1) (1871) 15 W. R. 247.

(2) (1872) 18 W. R. 401.

(3) (1875) 24 W. R. 198.

(4) (1884) 1 L. R. 7 All. 28.

ratification. Moreover this plea was not expressly taken in the written statement of the defendants or pressed in the lower Court.

The appellants, thereupon, preferred the present appeals, which were consolidated, to His Majesty in Council.

Mr. De Gruyther and *Mr. G. A. H. Branson* for the Appellants :

The question for decision relates to Mahomedan usage or institution and the law applicable to the case is the Mahomedan Law on grounds of justice, equity and good conscience : [The Bengal, United Provinces and Assam Civil Courts Act (XII of 1887, B. C.), Sec. 37.] To assert a valid claim to pre-emption two formalities are requisite, known as the *talab-i-mowa-shibat* and the *talab-i-istishad*. The former consists in declaring an intention to pre-empt immediately on hearing of the sale, the latter consists in a formal declaration made with the least practicable delay to the same effect, before witnesses, in the presence of either the vendor or vendee, or on the premises sold ; for the explanations and definitions of these two terms, reference was made to Baillie's Digest of Mahomedan Law, Vol. 1 (2nd Ed. 1875) pp. 487 and 489 ; Hamilton's Hedaya (2nd Ed. 1870) pp. 550 and 551 ; *Jarfān Khan v. Jabbar Meah* (1) ; Ameer Ali's Mahomedan Law, Vol. 1. (3rd Ed. 1904) Chapter 25 section 3, and *Ram Mohan Das v. Lakhi Narayan Roy* (2). The law seems to rest upon the *Koran* and thereupon tradition and lastly upon the judicial decision and interpretation of the *Koran* and tradition. Both Courts in India have concurred in holding that *talab-i-mowashibat* was duly and properly performed by the appellants immediately on hearing of the sale ; they have also concurrently found that the *talab-i-istishad* was duly performed. But the Subordinate Judge held that there was no unnecessary delay in its performance, while the High Court held that there was delay. It is submitted that the Subordinate Judge was right and that the High Court erred. *Talab-i-istishad* must be performed after the first demand without any unnecessary delay, which means that it must be performed in a reasonable time. The pre-emptor is entitled to be satisfied as to the truth of the sale. There was no delay after the facts were obtained. The official calendar shows that the delay was due to holidays ; the appellants are not responsible for that.

The High Court was wrong in holding that the appellants

(1) (1884) I. L. R. 10 Calc. 383 at 387.

(2) (1870) 4 B. L. B. 203 (A. C. J.).

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waived their right to pre-empt, because when they could not come to terms, they said "you may sell to anyone you like." The true consideration for the sale was Rs. 37,000 as found by the Subordinate Judge.

Mr. Jardine, K. C., and Mr. Cowell for the Respondent : The right of pre-emption owes its origin to motives of expediency and a desire to prevent the introduction of a stranger among co-sharers and neighbours likely to cause inconvenience or vexation. It is a personal right and not a right incidental to ownership of property : Ameer Ali's Mahomedan Law, Vol. 1, (3rd Ed.) 1904 p. 596. Reference was also made to Sir R. K. Wilson's Digest of Anglo-Mahommedan Law (2nd Ed., 1903), Chapter 12 Articles 375 and 379 ; and Baillie's Digest of Mahommedan Law, Bk. 7, Chapters 1 and 3. It is not necessary that the pre-emptor should tender the price at the time of making his formal claim. Here the delay is partly put down to getting escort of police for safety of the tender money. *Talab-i-istishad* should be made with the least practicable delay : *Mussammat Fumeelun v. Luteef Hassim* (1). The High Court is right in coming to the conclusion that there was unnecessary delay. There is ample evidence to show that the appellants were perfectly aware of the negotiations, which brought about the sale in question. The ceremony of *talab-i-istishad* must be done "*instantly*," and it is not enough, as the Subordinate Judge says, that there should be no gross negligence in doing it.

If the pre-emptor takes any benefit from the purchaser or recognises his right under the purchase in any way, he (the pre-emptor) waives his right of pre-emption. The purchaser paid money into Court on July 2nd, 1898 to pay off the mortgage on the property. The appellants, pre-emptors, who were the mortgagees, took that money out of Court on September 13th, 1908, and gave possession to the purchaser. The appellants thus recognised the purchase and waived their right to pre-empt. The High Court says the point was not raised in the written statement, which was filed on September 1. The money was taken out on September 13. It was, therefore, not possible to raise this plea in the written statement. But it was raised at the earliest opportunity in the memorandum of appeal. The appellants having once taken the money out of Court, could not question the purchase : Reference was made to the Transfer of

(1) (1871) 16 W. R. 18 at 14 (F. B.)

Property Act (IV of 1882), sections 83 and 84 ; and *Habib-un-Nissa v. Barkat Ali* (1).

Mr. DeGruyther replied.

The judgment of their Lordships was delivered by

Sir Arthur Wilson.—These two consolidated appeals arise out of two suits, one brought by Magni Ram, the other by Jowhuri Lal, to enforce a right of pre-emption in respect of a share in certain properties comprised in *taluka* Raqulpur Bhatowni.

By conveyances, dated 28th January 1891 and 9th July 1897, Magni and Jowhuri had become the owners in equal shares of 12 annas of the property. The remaining four annas belonged to the respondent, Anupbati Koeri, who on the 17th December 1897, sold those four annas to Nirbhoy Chowdhury ; and that is the sale against which the right of pre-emption is claimed. It has been found that Jowhuri first heard of the sale on 20th December 1897, and that thereupon he at once made the immediate claim to pre-empt which the law requires. Magni first heard of the sale on the 5th of January 1898, and at once made his immediate claim. No question, therefore, arises with regard to the first claim by each of the two men. The principal controversy between the parties, and the point on which the Courts below have differed, is an alleged delay in making the second claim, the claim with witnesses, which also is required by law.

Jowhuri, on hearing of the sale, which he did at Monghyr, at once sent to his agent at or near Gogri to procure from the Registry Office a copy of the sale deed. The agent obtained that copy and sent it to Jowhuri, who actually received it on the 4th January. The High Court, differing from the Subordinate Judge, has found unreasonable delay at two points of these proceedings. It has held, first, that the copy from the Registry was not obtained and sent off as soon as it might have been. But an examination of the official calendar shows clearly that the learned Judges were led to this conclusion by a misapprehension as to the time during which the Registry Office was closed for the Christmas vacation. The High Court held, secondly, that Jowhuri was guilty of wilful delay by his refusal to receive the packet containing the copy of the sale deed from the Post Office peon. This conclusion is based upon the evidence of the peon himself, which the learned Judges believed. But the Judge who had this witness before him disbelieved his story. That story is

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(1) (1886) I. L. R. 3 All. 275.

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admittedly inconsistent with the rules of the Post Office ; and it finds no support from the witness's own endorsement made at the time. Their Lordships think that the Subordinate Judge was right in rejecting that story, and, therefore, the second allegation of delay fails.

The more serious case of delay is said to have occurred subsequently, and with respect to it the position of Magni and Jowhuri is identical. On the 5th January they knew everything which it was essential to know. On that day, they took the advice of a local barrister, and in accordance with his advice they on the next day, the 6th January, applied to the proper officer for a police guard to protect the messengers and the money, which it was proposed those messengers should tender. This guard they obtained on the 7th, and the messengers started. On that day those messengers made the claim (and, as has been found, with due formalities) at the house of Nirbhoy, the purchaser. On subsequent days the claim was renewed at the house of the vendor, and upon the land. The question that arises is, whether the interval that elapsed between the 5th January and the 7th January is a fatal delay. The Subordinate Judge held that it was not ; the High Court held that it was.

There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned Judges of the High Court for overruling the decision of the first Court, on a pure question of fact, were insufficient.

Another point argued on behalf of the respondents arises in this way : The two plaintiffs Magni and Jowhuri had obtained a transfer of a zurpeshgi mortgage binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the mortgage money into Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage ; and after some hesitation the two plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption.

Their Lordships cannot agree with this contention. Until a

decree for pre-emption was made Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than this, and was quite consistent with the claim to pre-empt.

There remains only one other point for consideration, as to which again the Courts in India have differed : and that is as to the amount actually paid by Nirbhoy to Anupbati, the difference being Rs. 7,850. As to this point their Lordships do not find a clear and positive finding by the Subordinate Judge that the full sum named in the deed of sale was not in fact paid ; and they are not prepared to dissent upon this point from the judgment of the High Court.

Their Lordships will humbly advise His Majesty that these appeals should be allowed ; that the decrees of the High Court should be discharged with costs ; that the decrees of the Court of the Subordinate Judge should be varied by directing the price of pre-emption to be calculated the sum of Rs. 44,850 (the price named in the deed of sale from Anupbati to Nirbhoy) and the amounts to be deposited in the Court of the Subordinate Judge within such time as the High Court or the Subordinate Judge may determine ; that subject to these variations and the payment to the appellants of additional costs (if any) the decrees of the Subordinate Judge should be restored ; and that the cases should be remitted to the High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.

The respondents who have resisted the appeals will pay the costs thereof.

Messrs. Watkins and Lempriere : Appellants' Solicitor.

Messrs. A. H. Arnould & Son : Respondents' Solicitor.

J. M. P.

Appeal allowed.

PRESENT : *Lord Robertson, Lord Collins and Sir Arthur Wilson.*

RAJA RAI BHAGWAT DAYAL SINGH AND OTHERS

v.

DEBI DAYAL SAHU AND OTHERS.

ChamPERTY—Public policy—Hindu Law—Female heir with limited interest—Alienation—Reversioner—Legal necessity—Assignor and assignee, questions between—Ratification—Law of Agency—Indian Contract Act (IX of 1872), Sec. 198.

The English law as to maintenance and champerty is not applicable to India.

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and
November, 4,
1908.
January, 24.

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Ram Coomar Coondoo v. Chander Canto Mookerjee (1), *Kunwar Ram Lal v. Nil Kint* (2), and *Lala Achal Ram v. Raja Kazim Husain Khan* (3) approved and followed.

In a suit by an assignee to enforce a right, where the assignment is supported by the assignor, no question can be raised that the transaction was an unfair and unconscionable bargain, for an inadequate price as between the assignor and the assignee.

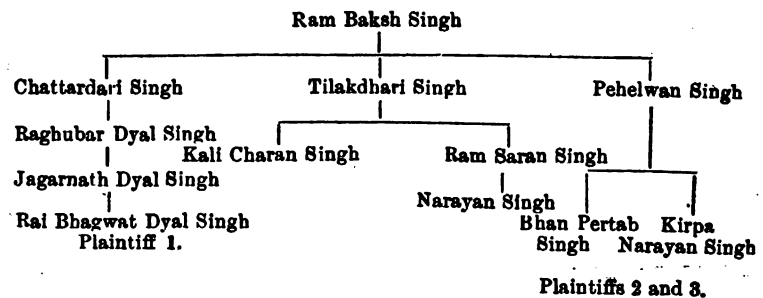
Where a person claims title under a conveyance from a woman who is a limited owner and seeks to enforce his right against the reversioner, he must prove, *first* that the conveyance is genuine, *secondly* that the lady had full knowledge and *thirdly*, either that the alienation was for necessity or that he was satisfied of necessity upon reasonable enquiry.

Ratification with reference to the law of agency is applicable only to acts done on behalf of the ratifier as laid down in section 196 of the Indian Contract Act.

Two consolidated appeals from two decrees of the High Court of Judicature at Fort William, in Bengal, (Rampini and Pargiter JJ., July 28, 1903) modifying two decrees of the Court of the Subordinate Judge of Zillah Ranchi (December 20, 1899) and dismissing the appellants' suits with costs.

The main questions raised in the appeal were whether the suits were maintainable on the ground of champerty and maintenance, and whether two deeds of sale executed by certain Hindu ladies were valid and binding on the male reversioners to the estate of the last male owner in possession.

The following pedigree will help to explain the facts of the case :—



Of the persons named in the above pedigree, Tilakdhari Singh was the owner of the villages Lalgara, Chiyanki and Ganka—the subject matter of the suits, and others. He died in 1868, and was succeeded by his son, Ram Saran Singh, his other son, Kali Charan Singh, having predeceased him. Ram Saran Singh died on February 7, 1879, and was succeeded by his infant

(1) (1876) L. R. 4 I. A. 23.

(2) (1893) L. R. 20 I. A. 112.

(3) (1905) L. R. 32 I. A. 113.

son, Narayan Singh, who died, while still an infant and unmarried, on August 7, 1879, leaving him surviving his step-mother, Mussamat Etraj Koer, the widow of Ram Saran Singh, as also his grandmother, Mussamat Jaleb Koer, the widow of Tilakdhari Singh, and Mussamat Aprup Koer, the widow of Kali Charan Singh. The male members of the family then alive were Rai Bhagwat Dyal Singh, Bhan Pertab Singh, and Kirpa Narayan Singh.

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On February 10, 1877, Ram Saran Singh granted to the respondent Debi Dayal Sahu a Zurpeshgi lease of certain lands in the village Lalgara, for a term of five years at an annual rental of Company's Rs. 2, "in lieu of a loan of money under a bond, and expenses amounting to Company's Rs. 600, which is fixed as zurpeshgi money."

On March 9, 1880, Mussammat Etraj Koer, having borrowed Rs. 600 "for paying off the debts due to creditors" of her husband from Debi Dayal Sahu, fixed that sum as zurpeshgi money and granted to him a zurpeshgi lease of certain lands in the village of Lalgara for a term of 9 years, at an annual rent of Rs. 2 "in lieu of the aforesaid zurpeshgi money of Rs. 600."

On the same date Mussammat Etraj Koer granted to Debi Dayal Sahu a zurpeshgi ticca pottah in the entire 16 annas of mouzahs Chiyanki and Ganki for a term of 9 years at an annual rental of Rs. 20. The deed recited "that Rs. 6,400 has justly been found due, according to account up to this day under 3 registered instalment bonds and simple bonds and temporary, to Debi Dayal Sahu—by the late Thakurai Ram Saran Singh, —and.....the said amount is daily increasing by interest, and it is impossible for me (Etraj Koer) to pay it off in one lump, for this reason, I, (Etraj Koer) have executed a separate bond to the said Sahu for Rs. 200 out of that amount, and there remained a balance of Rs. 6,200, and I (Etraj Koer) have fixed the said amount as zurpeshgi money." The whole of the sum of Rs. 6,200, the zurpeshgi money, was set off in payment of the money formerly due to the respondent Debi Dayal Sahu.

On the same date Mussammat Etraj Koer gave the respondent Debi Dayal Sahu a bond for the repayment of the balance of Rs. 200 referred to in the recital of the last mentioned deed, and undertook to "repay the said amount principal with interest at the rate of 8 annas per cent per mensem in one lump sum on 30th Magh, 1288 F." If the principal and interest remained unpaid on the promised date, the interest after that date was to run

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at the rate of Rs. 2 per cent. per mensem up to the date of payment of the principal and interest.

On July 24, 1880, Mussammat Etraj Koer executed a simple bond in favour of Debi Dayal Sahu for Rs. 1,000. The rate of interest was Rs. 2 per cent. per mensem and the amount was made up as follows :—

1. Due under bond dated March 9, 1880	... Rs. 200
2. Paid in cash	... Rs. 800

Rs. 1,000

On August 26, 1880, the Court of the Deputy Commissioner and the Subordinate Judge, Lohardaga, granted a certificate under Act XXVII of 1860, to Mussammat Etraj Koer, whose application was opposed by Bhan Pertab Singh.

On May 16, 1881, Raja Rai Bhagwant Dayal Singh instituted a suit against Mussammats Etraj Koer, Jaleb Koer, and Aprup Koer to recover possession from them of all the villages which had been in the possession of Narayan Singh, basing his title on the family custom by which maintenance grants reverted to the Raj on the death of the maintenance holder without direct male descendants. The suit was finally determined by a judgment of the High Court of Judicature at Fort William, in Bengal, on July 11, 1883, which decided that the village Nowa reverted to the Raj under the alleged custom, but that the remaining villages in suit were the self-acquired property of Tilakdhari Singh, and as to those, the suit was dismissed. Bhan Pertab Singh and Kirpa Narayan Singh intervened in that suit.

On July 12, 1882, Mussamat Etraj Koer "borrowed Rs. 2,000 in cash for necessary expenses in the High Court" from Nandram Dubey, at Rs. 2 per cent. per mensem, and gave him as security for the loan a mortgage on the village Sonehera.

On October 19, 1882, Mussammat Etraj Koer executed a bond for Rs. 600 in favour of Debi Dayal Sahu, of which "Rs. 300 is due to him, on account of expenses, taken in cash," and Rs. 210 borrowed in cash "for the purpose of meeting expenses." The rate of interest was 2 per cent. per mensem.

On August 30, 1883, Mussammat Etraj Koer gave Debi Dayal Sahu a mortgage bond of Rs. 3,500 on Chiyanki and Ganka at Rs. 1-12-0 per cent. interest per mensem. It recited that "according to account Rs. 2,613-14-0 has now been found due to Debi Dayal Sahu..... under two former bonds (dated July 24, 1880, and October 19, 1882) and petty amounts borrowed

at different times, and now I, (Etraj Koer) have borrowed Rs. 886-2-0 for the purpose of making payment to muktear Maksud Ali and meeting necessary expenses."

On March 4, 1884, Mussammats Etraj Koer, Jileb Koer and Aprup Koer executed in favour of Debi Dayal Sahu a mortgage bond on Chiyanki and Ganka for Rs. 5,387 at Rs. 1-12-0 per cent. interest per mensem. It recited that "money is due to Debi Dayal Sahu under a registered zurpeshgi pottah, dated 9th March 1880, for Rs. 6,200.....another registered zurpeshgi pottah, dated 9th, March, 1880..... for Rs. 600.....and a zurpeshgi pottah, dated 10th. February, 1877,..... for Rs. 600.....and besides this, according to account, Rs. 3,887, principal and interest, has been found due by us (the three Mussammats) under a registered mortgage bond, dated 30th August, 1883.....and we (Mussammats) now borrow Rs. 1,500 from the said Sahu in cash for the purpose of meeting the expenses of the marriage of the daughters of Thakurai Ram Saran Singh deceased."

On May 2nd. 1884, Mussammats Jileb Koer, Aprup Koer and Etraj Koer gave William Arthur Redford two mortgage bonds for Rs. 4,000 on the villages Lalgara and Hurilong. They were identically in the same terms and each contained the following recital :—"The marriages of the daughters of the late Thakurai Ram Saran Singh..... are about to take place and the bridegroom's party is expected to come here to-morrow from districts Balia and Ghazipur ; therefore to meet the expenses of the marriages and to keep up the dignity and prestige of us, the declarants, and that of our family we are in need of Rs. 4,000. For this reason, we the declarants, out of respective free will and accord have borrowed Rs. 2,000.....on interest at the rate of Rs. 2-8-0 per cent. per mensem."

On May 26th. 1884, the three Mussammats borrowed Rs. 4,000 from N. A. Hodges at the same rate of interest and for the same object as stated in the mortgage bonds given to Redford.

On December 22nd. 1884, the three Mussammats borrowed Rs. 600 from Akhouri Gokhulnand, who subsequently obtained a decree against them for Rs. 785-15-6.

On August 20th., 1885, the three Mussammats executed a mortgage deed on Lalgara in favour of Debi Dayal Sahu for a consideration of Rs. 10,000 made up as follows :—

	Rs.	A.	P.
1. Due under deed March 4th., 1884	7,083	12	0
2. Paid in cash	2,916	4	0
Total Rs.	10,000	0	0

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The deed recited that the cash was borrowed "for the purpose of paying off the debts due to the other creditors and to meet necessary expenses." The interest was at the rate of Rs. 1-12-0 per cent. per mensem.

On September 24th., 1885, the three Mussammats borrowed from Debi Dayal Sahu Rs. 300 at Rs. 2 per cent. per mensem "for the purpose of paying interest to Hodges Saheb" and executed a simple bond in his favour.

On January 27th., 1886, Mussamat Etraj Koer executed a mortgage deed in favour of Nandram Dubey for Rs. 4,000 made up as follows :—

	Rs.	A.	P.
1. Principal and interest due under bond dated July 12th., 1882	3,754 11 0
2. Principal and interest due under bond dated January 18th., 1885	125 8 0
3. Paid in cash	119 13 0
<hr/>			
Total Rs.	...	4,000	0 0

The interest was at the rate of Rs. 2 per cent. per mensem, and the cash was borrowed "on account of necessary business."

On January 19th. 1887, the three Mussammats sold the villages of Chiyanki and Ganka to Debi Dayal Sahu, and executed a deed in his favour. The consideration was Rs. 20,916-5-0.

Made up as follows :—

	Rs.	As.	P.
1. Principal and interest due under deed, dated March 9th., 1880	6,200 0 0
2. Principal and interest due under deed, dated August 20th., 1885	13,068 5 0
3. On account of expenses	50 0 0
4. Principal and interest due under bond dated September 24th., 1885	398 0 0
5. Paid in cash	1,200 0 0
<hr/>			
Total Rs.	...	20,916	5 0

It recited that "these debts were incurred for the purpose of meeting legal and *shastric* expenses, and it is proper and necessary under every circumstance for us (the three ladies), the declarants to pay it off; and the interest of the said money is daily increasing whereby it is apprehended that the properties held by us, the declarants, shall be ruined and destroyed. And besides this,

money is also due to several other creditors. For this reason there is no other means whereby this heavy debt and debts due to the other creditors can be paid off by us, the declarants. Therefore, under these circumstances, except by transferring a portion of the properties held by us, it is impossible to pay off the aforesaid debts in any other way."

On August 2nd. 1887, Redford obtained on his two registered mortgage bonds, dated May 21st, 1884 a decree for Rs. 5,977-5-11. And on same date Hodges obtained on his registered bond, dated May 26th, 1884, a decree for Rs. 5,098-13-6. In execution of these decrees Lalgara was put up for sale.

On September 11th., 1888, three Mussammats borrowed Rs. 8,000 at Rs. 2 per cent. per mensem from Hanuman Singh to pay off the decretal amounts due to Redford and Hodges, and executed a deed of mortgage on Lalgara in his favour.

On October 13th., 1890 the three Massammats borrowed Rs. 500 " for the purpose of giving portion presents (*rukhsut*) to sons-in-law" from Ganput Sahu and Ram Ratan Sahu, sons of Debi Dayal Sahu and gave them a simple bond.

On October 16th., 1890, the three Mussammats executed a deed of mortgage on Lalgara in favour of Ganput Sahu and Ram Ratan Sahu for a consideration of Rs. 1,000 made up as follows:—

	Rs.	A.	P.
1. Due on bond dated October 13th., 1890 ...	500	0	0
2. On account of petty expenses ...	156	0	0
3. Cash payment	344	0	0

Total Rs. ... 1,000 0 0

Rs. 344 was borrowed " for the purpose of paying off the debts due to creditors." Rs. 2 per cent. per mensem was the rate of interest.

On May 15th., 1891, the three Mussammats executed in favour of N. A. Hodges a deed whereby they sold the village of Lalgara to him for a consideration of Rs 34,000 made up as follows :—

Rs. A. P.

1. Paid to Hanuman Singh on account of principal and interest due to him under the mortgage deed, dated, September 11th., 1888	13,136	10	0
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Carried over ... Rs. 13,136 10 0

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	Brought forward ...	Rs. 13,136	10	0
2.	Paid to the Sahu on account of principal and interest due under three mortgage deeds, dated February 10th., 1887, March 9th., 1880, and October 16th., 1890 ...	2,340	0	0
3.	Paid to Akhouri Gokhulnand ...	801	4	6
4.	Paid to Nandram Dubey on account of principal and interest due under the mortgage deed, dated January 27th., 1886 ...	6,800	0	0
5.	Paid in cash ...	10,922	1	6
Total Rs. ...		34,000	0	0

The deed recited, "*inter alia* that Rs. 40,000 or Rs. 42,000 is due to the creditors by us, the declarants; but we, the declarants, could not pay it off up to this moment; and if this debt be not paid off for a short time more, then all the properties held and possessed by us, the declarants, will be sold at auction sale and will be ruined, and it is impossible to pay off such a large debt by any means except by means of transfer of property." Of the consideration it set out that "Rs. 23,077-14-6 has been set off and deposited with the said Sahib, and we have received now the balance of Rs. 10,922-1-6 from the said vendee."

On December 1st., 1893, N. A. Hodges executed a deed of sale and conveyed his interest in the village Lalgara to Debi Dayal Sahu, Gunpat Sahu, Ram Ratan Sahu, and Ram Bilas Sahu for a consideration of Rs. 40,000.

Mussammat Jileb Koer died on November 22nd., 1894. Mussammat Aprup Koer died on February 7th., 1895. On November 29th., 1895, Bhan Pertab Singh and Kirpa Narayan Singh sold the whole of their right, title and interest in the estate of Narayan Singh to Raja Rai Bhagwat Dayal Singh for a nominal consideration of Rs. 52,600, of which sum Rs. 600 was paid in cash to the vendors, and the balance was only payable to them in the event of the vendee's success in obtaining the property in suit. Mussammat Etraj Koer died on August 25th., 1897.

On August 29th., 1898, Raja Rai Bhagwat Dayal Singh, Bhanpertap Singh, and Kirpa Narayan Singh, instituted two suits in the Court of the Subordinate Judge of Ranchi. One of the suits (No. 8 of 1899) related to the village of Lalgara and the defendants to that suit were Debi Dayal Sahu; Gunpat Sahu, Ram Ratan Sahu, Ram Bilas Sahu, and the executors of N. A. Hodges now represented by the respondent J. W. Sowton. The

other suit (No. 9 of 1899) related to the villages Chiyanki and Ganka, and Debi Dayal Sahu was the sole defendant thereto. The pleadings and issues in both suits were similar. The plaintiff alleged *inter alia* that large property consisting of land and moveables which passed on the death of the last male owner to his heiress, produced an income of Rs. 10,000 a year. If the deeds of sale of the villages in suit were in fact executed, they were valid only for the life of the executant. The defendants knew, or, on inquiry, might have known that the income derived by Mussammat Jileb Koer from the estate of the last male holder, was more than amply sufficient to meet all her legitimate wants, and all legitimate charges thereon, and that there was no necessity, either in fact or law, for the alienation of the property in suit. The title of Bhanpertab Singh and Kirpa Narayan Singh to succeed on the death of Mussammat Jileb Koer was acquired by Bhagwat Dayal Singh under the sale deed of November 29, 1895. The prayers of the plaint were possession to be given to the first appellant, and for mesne profits, a declaration and further and other reliefs.

The defence was *inter alia* that Etraj Koer was in adverse possession of the estate for 12 years and had thereby obtained an absolute title, and, alternately, that if Jileb Koer took the estate by inheritance, she took an absolute estate as paternal grandmother under the Mitakshara law. That the Mussammats joined in the deeds fully understanding the value and consequence of the transaction and for proper value. "The consideration money obtained by the purchase of the property in suit has been applied to the payment of lawful and necessary debts, and for lawful and necessary purpose." The conveyance to Bhagwat Dayal Singh was without consideration, collusive and fraudulent, immoral and opposed to public policy, being made for the purpose of gambling in litigation of the issues fixed in suit No. 8 of 1899 it is necessary to mention here only the following :—

"5. Is the *kobala* executed by plaintiffs Nos. 2 and 3 in favour of plaintiff No. 1, in November 1895, a *bona fide* and valid deed? Did any consideration pass thereunder?

"6. Were Mussammats Jileb Koer, Aprup Koer, and Etraj Koer, the absolute owners of property in dispute, or was their interest a qualified one?

"7. Is the *kobala*, dated the 19th January 1887, executed by the Mussammats in favour of the defendants, a legal and

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valid document? Was it executed for legal necessities? Did any consideration pass, and did such go to satisfy debts, which constitute legal necessities? Is it binding on the reversioners?"

On December 20, 1899, the Subordinate Judge delivered one judgment in both suits. He decided the fifth issue in favour of the respondents, holding that the conveyance under which the first appellant claimed was gambling in litigation, immoral, and not enforceable on grounds of public policy. He, however, added, the conveyance failing, the title of the vendors, the 2nd and 3rd. plaintiffs, remained, and that they were entitled to a decree, if the alienations made by the ladies be invalid in law. On the sixth issue he decided that Jileb Koer was solely entitled to the succession to the last full owner and that she took a qualified estate. On the seventh issue he was of opinion that the estate of the ladies had been mismanaged, and that advantage had been taken of their position. He found that legal necessity was proved in regard to the payment of ancestral debts, and for the expenses attendant on the marriage of Ram Saran Singhs' daughters. In the result he passed decrees for possession in favour of the 2nd and 3rd appellants conditional on the payment to the respondents of the sums of Rs. 11,198-13-6 and Rs. 6,400 in suits Nos. 8 and 9 respectively made up as under:—

Suit No. 8.

	Rs.	A.	P.
Amount covered by the zurpeshgi pottah dated 10th February 1877 ...	600	0	0
Part of the amount of the mortgage bond dated 4th March 1884 ...	1,500	0	0
Amount of Radford's bond dated 2nd May 1884	2,000	0	0
Amount of Radford's bond dated 2nd May 1884	2,000	0	0
Amount of Mr. Hodge's decree ...	5,098	13	6
Total Rs.	11,198	13	6

Suit No. 9.

Amount of the zurpeshgi pottah dated 8th March 1880 ...	6,200	0	0
Amount of simple bond dated 9th March 1880	200	0	0
Total Rs.	6,400	0	0

The following passages are taken from the judgment of the Subordinate Judge:—

On examining the kobala Ex. I, I do not think it is insuffi-

ciently stamped. The consideration mentioned in it is Rs. 52,600, the stamp duty should be reckoned on this amount. The stamp papers on which it is written is more than sufficient under Art. XXI, Schedule I of the Stamp Act. Although the value of the property sold is now said to be three lakhs, but stamp duty should be calculated on the consideration mentioned in the deed itself and not on the market value of the property sold, as is laid down in the aforesaid Article. The execution of the *kobala* is proved by the testimony of Bhan Pertap Singh, and I see no reason to doubt its truth and genuineness. There is no circumstance elicited in the evidence, which can lead to an inference of fraud and collusion in respect of the contract of sale. But the contract, I think, is illegal and void. The vendors are not in possession of the properties sold and they are not in a position to deliver possession of the properties to the vendee nor do they in the *kobala* promise to do so. The vendee also has not paid the entire amount of the consideration stipulated in the document. The deposition of Bhan Pertap Singh shows and the *kobala* recites that only Rs. 600 out of Rs. 52,600 has been paid. Thus there is defect in the passing of the consideration also. The property is actually worth three lakhs of rupees, but it has been sold for a little more than one-sixth of its value. This inadequacy of consideration establishes the unfairness and unreasonableness of the contract. There is defect with regard to the payment of the consideration mentioned in the deed. The payment of the consideration is agreed to be governed by the success of the vendee in recovering possession of the properties sold and to be proportionate to it. Bhan Pertap Singh also states that the consideration will be paid as the cases proceed on. Although towards the end of his deposition he denies the stipulation in the *kobala* to this effect, but no importance can be attached to his denial. There is a condition attached to the payment of the consideration, that is, the vendee should sue for possession of the properties sold or manage to recover possession of such properties before his liability to pay the consideration can arise. The condition precedent contemplates gambling in litigation, which is contrary to public policy and immoral in the eye of the law. The entire transaction savours of speculation in litigation. It is not a *bona fide* purchase of an actionable claim. There is no unconditional promise to pay the entire amount of the consideration. The inadequacy of the consideration agreed to be paid and the condition imposed to precede the liability to pay

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the same made the bargain extortionate, unconscionable, unfair and opposed to public policy. It should, in my opinion, be held to be *null* and *void*. But this cannot be fatal to the present suits. The contract being illegal and void, the result is that plaintiffs Nos. 2 and 3 must be considered as not having sold their rights to the inheritance, which remains vested in them. The contention of the defendant to the contrary is groundless. If the sale be valid, the plaintiff No. 1 has the right to bring this suit. If it be invalid and inoperative the rights of plaintiffs Nos. 2 and 3 could not have passed and they are entitled to recover possession of the properties in suit. They came under the category of plaintiffs and are justified in maintaining these suits. It is urged that the plaintiffs Nos. 2 and 3 do not pray in these suits to have possession of the properties delivered to them. This contention is no doubt consistent with the prayer No. (a) and the defendant could have succeeded if there had been no general prayer as in "No. (e). Apart from the four prayers specifically and distinctly mentioned, all the plaintiffs pray that any further and other relief than those be awarded to them. If, therefore, any other relief be deemed proper and just to be given in these suits, I do not see why it should be denied. Plaintiffs Nos. 2 and 3 are the reversioners and are on the record. They are, therefore, entitled to recover possession of the villages if the alienations made by the widows be invalid under the law.

Thus all the circumstances mentioned above are, in my opinion, sufficient to vitiate the sales. The defendants, however, are entitled to a refund of the amounts, which were actually advanced to the ladies for liquidating ancestral debts, left by Ram Saran, for supplying costs of suits and for meeting the marriage expenses. The bonds executed by Ram Saran Singh have been proved and so the deeds executed by Mussammat Etraj Koer for paying debts left by the latter. There is hardly any reliable evidence to prove loans taken for costs of suit. Exhibit K. shows money was taken for suits, but it does not recite how much ; Debi Dayal also does not state how much was taken for costs of suit and how much to pay off creditors. Exhibit G, and the oral evidence are not sufficient to establish the fact. So the defendants are not entitled to anything as costs of suits. As for the marriage expenses, we have Exs. O, X, Y, and the decrees of Mr. Hodges and other papers supported by oral evidence. Exs. VIII and IX relied on by the plaintiffs support the contention of the defendants. The plaintiffs should, there-

fore pay these amounts, advanced for liquidating ancestral debts and meeting marriage expenses, before they can recover possession of the villages in dispute. The oral evidence adduced by the defendants shows the names of certain creditors and the nature of some debts, which do not appear in the documents. This, I think, is clearly an afterthought and is not reliable. It is contended that Mussammat Etraj Koer was not the rightful heiress. She had no power to acknowledge the ancestral debts, nor to borrow money for the family and create charges on the family properties. But I have already shown before that Mussammat Jileb Koer did everything and the name of Etraj Koer was at first given out under a wrong notion that she was the proper heiress. Besides Mussammat Jileb Koer subsequently accepted and ratified in a formal manner the acts of Etraj Koer. Hence the documents purporting to be executed by Mussammat Etraj Koer should, I think, be held good and valid."

Both the appellants and the respondents appealed to the High Court of Judicature at Fort William in Bengal. On July 20th 1903, that Court delivered its judgment dismissing the suits with costs. The finding of the Subordinate Judge that the suits were not maintainable by Bhagwat Dayal Singh was affirmed, and in that finding the High Court was of opinion that the suits ought to have been dismissed. It also held that there was legal necessity for the execution of each deed of sale and that they were made for adequate consideration. Its judgment contained the following :

"We agree with the Subordinate Judge that this deed is void for the reasons assigned by him. In the first place the property conveyed is worth three lakhs. The consideration of the conveyance was Rs. 52,600, of which the sum of Rs. 600 only was said to have been paid. The balance was to be paid in proportion to the plaintiff's success in recovering the property. Although the English rule against champerty and maintenance does not prevail in this country in its entirety, yet this would seem clearly an unconscionable and speculative agreement, and one opposed to public policy as fostering and promoting gambling in litigation, and hence void as found by the Subordinate Judge. See *Ram Coomar v. Chunder Canto* (1) and *Fischer v. Kamala Naicker* (2).

"The next question which arises is, whether the plaintiff's suit should not have in these circumstances been entirely dis-

(1) (1876) 1, L. R. 2 Calc. 233.

(2) (1880) 8 Moo. I. A. 170 at 187.

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missed. It seems to us that they should. The plaintiff No. 1 has been found by the Subordinate Judge to have no title to the property. He is the only person who claimed possession of it. When his suits are dismissed, it seems to us, the Subordinate Judge was not justified in giving the plaintiffs Nos. 2 and 3 a decree for relief, which they did not ask for and in respect of which in their plaints they made no claim. In the plaints they alleged that they had entirely transferred their interests to the plaintiff No. 1. They asked for nothing for themselves. In paragraph 20, it is alleged that the plaintiffs 2nd party are made parties to the suits merely in order that the suits may be decided in their presence,—so that they may be bound by the decisions. They might, therefore, have equally well been defendants—if indeed they should not more properly have occupied that position.

“We, therefore, feel no doubt that the sales disputed in these suits were good sales, made for legal necessity, and after due enquiries had been made by the purchasers, which in the circumstances they were not required to make. The suits seem to belong to a class very common in this country, in which reversioners endeavour to recover property alienated by Hindu widows for legal and pressing necessities, and in which purchasers of property from such widows too often lose both their property and the money they have paid for it. It is unnecessary, we think, to discuss the last plea raised by the defendant, *viz*, whether the Subordinate Judge was justified in giving the plaintiffs decrees for the recovery of the property conditional on their payment to the defendant of the sums of Rs. 11,198 and Rs. 6,400. We would only say that we do not think he was. The plaintiffs made no offer to pay off any sums which might be found to have been borrowed for legal necessities. The plaintiffs deliberately chose to rest their cases upon allegations of wasteful, extravagant, and unnecessary borrowing, and they have failed to substantiate their allegations. They have never offered to repay any portion of the purchase money and we do not consider that the alienations were in excess of the legal requirements of the case, and that the purchasers in any way failed to make proper enquiries.”

The appellants, thereupon, preferred to present appeals to His Majesty in Council.

Mr. Cohen, K. C., and Mr. Brown, for the Appellants :

The lower Courts were wrong in holding that the deed of conveyance executed by the 2nd and 3rd appellants in favour of the 1st appellant was void. Reference was made to *Bradlaugh v.*

Newdegate (1) and *Alabaster v. Harness* (2), for the English law of maintenance and champerty. But the English law does not go so far as to upset an agreement of this kind. There is not a single English case to support the view taken by the Courts in India. But in India the English law of maintenance and champerty has never been introduced, and, therefore, the agreement in question is valid: *Ram Coomar Coondoo v. Chunder Canto Mukerjee* (3); again in the case of *Kunwar Ram Lal v. Nil Kanth* (4) it is laid down that the English law of champerty is not in force in India, and documents which set up agreements to share the subject of litigation, if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy. The lower Courts were wrong in holding that this agreement was against public policy as it was a gamble in litigation. The question of the validity of the agreement could arise only between the parties to it. The respondents are not parties to it and they cannot question its validity on the ground of it being champertous; *Lal Achal Ram v. Raja Kazim Husain Khan*. (5)

The Subordinate Judge was right in setting aside the alienations to the respondents. There is a general prayer of relief in the plaint and that would cover the decree made by the Subordinate Judge.

A Hindu widow cannot of her own will alienate the property except for special purposes, if there be collateral heirs of her deceased husband. To support an alienation for worldly purposes, she must show necessity: *The Collector of Masullipatam v. Cavalry Vencata Narrainapah* (6).

In order to sustain an alienation by a Hindu widow of the corpus of her husband's estate, it must be shown, in a case like this, that there was legal necessity for the alienation, or, at least, that the grantee was led on reasonable grounds to believe that there was. The obligation on the grantee is to inquire and satisfy himself that the widow from whom he is taking a charge upon her husband's inheritance had a proper justification for so charging. This onus is not discharged, if the grantee or mortgagee rest content as the respondents here do with the vague and misleading statements in the deed. Nor would it

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(1) (1888) 11 Q. B. D. 1. (2) (1895) 1. Q. B. 339.

(3) (1876) L. R. 4. I. A. 23; I. L. R. 2 Calc. 233.

(4) (1893) L. R. 20. I. A. 112, 115.

(5) (1905) L. R. 32 I. A. 113.

(6) (1861) 3 Moo. I. A. 498, at 543—551.

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be discharged by thinking that he, the mortgagee, is taking title under an absolute owner : *Lala Amarnath Sah v. Rani Achan Kuar* (1). It is for the mortgagee or alienee to allege and prove the circumstances which alone will give validity to the mortgage : *Sham Sunder Lal v. Achhan Kunwar* (2) : Reference was also made to *Tacoordeen Tewary v. Nawab Syed Ali Hossein Khan* (3) *Baboo Hameshwar Pershad v. Run Bahadoor Singh* (4) ; *Tika Ram v. Deputy Commissioner of Bara Banki* (5) and *Deputy Commssioner of Kheri v. Khanjan Singh* (6). The Subordinate Judge was right in holding that the respondents have not discharged the burden of proof that is incumbent upon them to validate the deeds of January 19th, 1887 and May 15th, 1891. Debi Dayal Sahu himself says " I cannot say how much did the Mussammats borrow for the suit. I did not inquire how much had Mussammats borrowed for the suit before borrowing from Nand Ram. Rs. 10,900 ; 1,000 and 4,200 were given to the Mussammats to pay off their creditors. I heard of this. I made no inquiries about this. I do not know whether Mr. Hodges did not himself keep back the amounts to pay off such creditors. I do not know whether such creditors had bonds. I made no inquiry when I purchased whether such men had bonds." The High Court is wrong on this point. The deeds in question are not valid and binding against the appellants and the Subordinate Judge has adopted the right mode of dealing with them.

Earlier bonds and mortgages were given by Etraj Koer, who had no interest in the property during the life time of Jileb Koer. They were not binding on the appellants. The consideration stated in each of the sale deeds mainly went towards the discharge of debts incurred by Etraj Koer and interest on those debts. They were not, under the circumstances, binding on the appellants.

Sir Robert Finlay, K. C. and *Mr. DeGruyther*, for the Respondents : The other side submitted that whether the agreement was void on the ground of its being champertous was a matter between the parties to it. But that is not so. This is not a deed got out of a party in necessity nor is it extortionate. If the validity of the deed were questioned on those grounds, it would be a matter between the parties. But in this case, the payment of the bulk of the consideration money depends upon the success of the then contemplated suit. That is merely a gamble in litigation, and

(1) (1892) L. R. 19 I. A. 196, at p. 202. (4) (1880) L. R. 8 I. A. 9, 11.

(2) (1898) L. R. 25 I. A. 183, at p. 191. (5) (1899) L. R. 26 I. A. 183, 191.

(3) (1874) L. R. 1 I. A. 192. (6) (1906) L. R. 34 I. A. 72.

contrary to public policy, and the Courts were right in holding the agreement void on those grounds. The question of its validity need not be raised only by a party to it. The respondent, who is not a party to it, could question its validity : *Tara Soonduree Chowdhurani v. The Court of Wards on behalf of Shama Soonduree* (1) (*Ram Coomar Condoo v. Chunder Canto Mukerjee*) (2) was a sequel to this case).

Though the English Statute Law and Common Law are not introduced into India there is something very similar to that in India, which will upset an agreement of this kind on the ground of its being a gamble in litigation : *Lal Achal Ram v. Raja Husain Khan* (3).

[Lord Robertson :—Can you show me any form of an agreement of this class, which would not be a gamble in litigation?]

The agreement is against public policy and is legally immoral ; and though the law of maintenance and champerty is not binding in India, it should be set aside on the ground of public policy.

[Lord Robertson :—Society in India makes it inexpedient to apply the law of champerty there.]

Reference was also made to Stephen's Commentaries (5th ed.) Vol. 4, Bk. VI, Ch. 9 XIII, p. 316, 317 ; Corpus Juris Civilis, Bk. 48, title 10, para. 20 (1865) 5th ed., Lipsial ; Le Droit Civil Explique, (15th Ed., 1856) by M. Troplong, p. 482 ; Corpus Juris Civilis, (1865) edited by D. Albertus Et D. Mauritius Fratres Krisgelu, Vol. I., Bk. 44, title 6, and Vol. II., Bk. 4., title 35, and Bk. 8., titles 36 and 37 ; Dictionaire Usuel De Droit by Map Legrand—Retraint litigieux ; and French Code, Vol. 2, Arts : 1699 and 1700.

The 1st appellant (plaintiff) claims possession and mesne profits on the ground of the alleged custom and assignment. The Subordinate Judge was wrong in giving the 2nd and 3rd appellants the relief, which he did. Neither of them has claimed any relief in the plaint, which is not amended. No amendment which is inconsistent with the original character of the suit, could now be made : Civil Procedure Code (Act XIV of 1882) Sec. 53. Relief given by the Subordinate Judge could not come under a prayer of general relief in the plaint. Such a prayer must always be limited by two things :—the facts which are alleged and the relief which is expressly asked : See

(1) (1871) 20 W. B. 446.

(2) (1876) L. B. 4 I. A. 28.

(3) (1905) L. B. 32, I. A. 113 at 121.

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Cargill v. Bower (1). Any relief which might have negatived another suit under section 13 of the Civil Procedure Code ought to be included in the general prayer, but not a relief of this kind.

[LORD ROBERTSON :—It breaks up the alliance, which is the theory of the plaint.]

Sir Robert Finlay :—Yes, My Lord, one claim is absolutely repugnant to the other. No amendment of the plaint was in fact made.

The evidence shows that debts were incurred for necessities. Money was borrowed over and over again to pay previous debts. Money borrowed to pay the costs of litigation was reasonable. Again, money borrowed to meet the marriage expenses, which were not extravagant, was a necessary. It is not incumbent upon the persons advancing money, as mortgagees or otherwise, to tax the bill and tell the borrowers, the ladies in this case, that a certain less amount of money would be sufficient instead of the sum contemplated to be spent. A Hindu widow is under an obligation to discharge her husband's debts, and she could either mortgage or alienate property for that purpose. A female heir is bound to maintain, and perform the marriages, and other ceremonies of those who are a burden on the estate, and she may mortgage or sell the property to procure the necessary funds: See Mayne on Hindu Law and Usage, 7th Ed; sections 633, 634, 635 and 346. Etraj Koer was the manager, and as such she gave the bonds, which were ratified by Jileb Koer and Aprup Koer by their joining Etraj Koer in the later documents, which recite the earlier bonds. Looking at the evidence, there is no case whatever of misconduct with the management of the three ladies or on the part of the respondents. The High Court was right in holding that the alienations here were for necessities, and therefore, binding on the appellants, the next heirs.

If the agreements of sale are set aside, the respondents are entitled to be put in their original position. The figure decreed by the Subordinate Judge is quite out of the question. He allows no interest, which should be allowed.

.. *Mr. Cohen, K. C.*, in reply, contended that neither the French nor the Roman Law of champerty would apply to India. Even the English Law on the subject was not in force in India. Reference was made to *Huntley v. Huntley* (2); *Tarachand v.*

(1) (1878) L. R. 10 Ch. D. 502 at 508.

(2) (1873) L. R. 8. Q. B. 112 at 115.

Suklal (1), and the Laws of England, Vol. I, p. 52, and the case there cited, There was not a single case either English or Indian, where the defendant was a third party and a stranger to the champertous agreement, and such agreement was set aside. Only one case of *Tara Soonduree Chowdhrain v. The Court of Wards* on behalf of *Shama Soonduree*, (2) was cited, but in that case the defendant derived her title through a party to the champertous agreement. Reference was also made to the Indian Contract Act (IX of 1872), Sec. 30; Civil Procedure Code (Act XIV of 1884), Sec. 13; and Principles of German Civil Law, by E. J. Schuster (Ed. 1907), headings, Effects of Absence of Authority, Ratification, and Ratification of Agreements, p. 119 & 120; and *Raj Lukhee Dabee v. Gokool Chunder Chowdhury*, (3). Etraj Koer had no authority to act for and she was not acting as the agent of Jileb Koer, who could not, therefore, ratify Etraj Koer's act. If the appellants get a decree for meane profits as well as for possession, the respondents may have interest at the usual rate, *i. e.*, 6 per cent. per annum.

The judgment of their Lordships was delivered by

Sir Arthur Wilson.—These consolidated appeals relate to three villages, Chiyanki, Ganka and Lalgara, and the substantial conflict is between the first appellant and the first respondent.

The villages with others were formerly the property of Ram Saran Singh, who on his death was succeeded by his infant son Narayan. Narayan died, while still an infant and unmarried, on the 7th August 1879, and left surviving him his grandmother Jileb Koer, an aunt Aprup Koer, widow of Ram Saran's brother, and a stepmother, Etraj Koer, widow of Ram Saran. Of these, the grandmother was heir to the boy's property, with the limited interest of a Hindu female inheriting from a male. The three ladies appear to have lived together down to the death of the grandmother, which took place on the 22nd November 1894.

On the death of the grandmother, the inheritance again opened, and the second and third appellants, Bhanpertap Singh and Kirpa Narayan Singh, were then the nearest male heirs of the deceased boy. Those two persons, on the 29th November 1895, purported to sell the three villages in question to Rajah Bhagwat Dayal Singh, the first appellant. And that is the title under which he claims.

The first respondent, on the other hand, as the case is now

(1) (1888) I. L. R. 12. Bom. 559.

(2) (1871) 20. W. R. 446.

(3) (1889) 18 Moo. I. A. 209 at p. 224.

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put on his behalf, claims under two sale deeds executed, as it is now said, by or on behalf of the grandmother, Jileb Koer, the sales being, it is contended, justified by necessity so as to pass the whole inheritance. The first of these deeds bore date the 19th January 1887. It purported to be a conveyance by way of sale, by the three ladies who have been mentioned, of the two villages Chiyanki and Ganka to the first respondent. The second deed was dated the 15th May 1891. It purported to be executed by the same three ladies in favour of one Hodges, and to convey to him by way of sale the village Lalgara. Hodges afterwards conveyed to the first respondent.

The present suits were brought on the 29th August 1898 in the Court of the Subordinate Judge at Ranchi. The plaintiffs were the first appellant and the two persons from whom he purchased. The sole defendant in one suit and the substantial defendant in the other was the first respondent. The first suit related to the village Lalgara, the second suit to the villages Chiyanki and Ganka. The claim in each case was for possession and mesne profits.

The first question raised in the case and argued on the appeals was whether or not the sale by the second and third appellants to the first appellant was void in law, so as to pass no title, on the ground that it was champertous, or contrary to public policy.

For the respondents it was boldly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet on other grounds what is substantially the same law is there in force. Their Lordships are of opinion that, that proposition cannot be supported. In three cases, *Ram Coomar Coondoo v. Chunder Canto Mookerjee* (1) *Runwar Ram Lal v. Nil Kanth* (2) and *Lal Achal Ram v. Raja Kazim Hussain Khan* (3) before this Board, a contrary doctrine has been laid down. In the last of those cases full effect was given, under circumstances closely analogous to those of the present case, to an agreement which would certainly have been void if champerty avoided transactions in India.

It was further argued that the transaction in question was contrary to public policy and void on that ground, by reason of the provision as to payment of the purchase money by the first appellant to the second and third. The purchase money was

(1) (1876) L. R. 4 I. A. 23.

(2) (1893) L. R. 20 I. A. 112.

(3) (1905) L. R. 32 I. A. 113.

fixed at Rs. 52,600, of which Rs. 600 was to be paid down, and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally.

It was further said, and this was relied upon in the Courts in India, that the transaction was an unfair and unconscionable bargain for an inadequate price. But that is a question between assignor and assignee. It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present actions. Their Lordships are, therefore, of opinion that the attack upon the title of the first appellant upon any such grounds as those indicated must fail.

The second question that has to be considered is whether the respondent has shown a good title in himself by purchase from Jileb Koer, the grandmother, under the two sale deeds mentioned, and under such circumstances as to make that title effectual against the reversionary heirs.

The Subordinate Judge, who tried the cases, held that the conveyances were not good, but he allowed, in favour of the first respondent, certain sums which he considered to have been advanced for purposes of legal necessity; and whilst giving a decree to the appellants and plaintiffs for possession of the property, he made that decree conditional upon the payment to that respondent of the sums held to have been advanced for legitimate necessities. On the argument of these appeals, Mr. Cohen for the appellants, accepted the propriety of this mode of dealing with the case, and assented to the allowance so made by the Subordinate Judge.

The High Court, on appeal, differed from the first Court, and held that the necessity for the sales in question was established.

Before dealing further with this question, it must be noticed that the case now contended for is not the case raised on the pleadings and relied upon at the trial. The respondent in his written statement alleged a title derived, not from Jileb Koer, but from Etraj Koer. He said, in paragraph 21, that "Etraj Koer was no heir to Narayan Saran Singh, and that she acquired

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an absolute right by adverse possession ; " in paragraph 23 " that it is not true, as the plaintiffs allege,.....that on the death of Narayan Saran Singh, Jileb Koer succeeded as heir and was in possession up to her death ; the fact is that Etraj Koer alone was in such possession until her death," and in paragraph 25 that " Jileb Koer and Aprup Koer never took the estate of Narayan Saran Singh as heir, and the fact of their joining in the documents as persons executing the deeds of sale and the prior deeds was a matter of form of evidence of members dependent for maintenance on Etraj Koer, and was merely a surplusage"; and it was added in paragraph 26 that " even if Jileb Koer were to have taken the estate by inheritance, she would take it in absolute state under the provisions of Mitakshara Law, and so also if she was made a co-sharer by Etraj Koer in Etraj Koer's right." In his evidence given at the trial, the respondent endeavoured to maintain the case that his title was derived from Etraj Koer and was good on that account.

One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take from a limited owner, but from one whose title he alleges to have been adverse to that owner.

These considerations apply with special force to the present case. The earlier transactions of the first respondent were with Etraj Koer, and there is no satisfactory evidence to show that Jileb Koer, the real owner, took part in them, or authorised them in any way.

It was argued however that, if Jileb Koer was not shown to have authorised the earlier transactions, she had ratified them by being a party to the later documents and particularly the two sale deeds. Ratification in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognised in section 196 of the Indian Contract Act. Looking to the substance

of the matter, it would be a serious extension of the law, as hitherto applied, to hold that a woman with a limited interest could, by acts *ex post facto*, charge upon the estate which she represents, obligations not originally binding upon it.

With regard to the first of the sale deeds now in question, when the details which make up the consideration come to be examined, it appears that they include one sum of Rs. 1,500 which the Subordinate Judge credited to the first respondent in the manner already explained. Apart from this sum, the great bulk of the consideration for this sale deed consists of debts originally incurred by Etraj Koer with accretions of interest and compound interest. Their Lordships are of opinion that this deed was correctly estimated by the Subordinate Judge.

The case as to the second sale deed is not quite so simple. With regard to it the Subordinate Judge gave credit to the first respondent for considerable sums as having been advanced for real necessities. As to the rest of the consideration for that deed, he held that necessity had not been established. In coming to this conclusion, he took into account not only the more general considerations already referred to, but also certain circumstances peculiar to the case—that the lady who alone had any power to convey was old, and had no independent advice to guide her, and that the first respondent was in a position to exercise considerable influence over her affairs. Their Lordships think the Subordinate Judge was justified in taking all these matters into his consideration; and they see no sufficient ground for rejecting his conclusions.

There remains one other point for consideration. The plaintiffs claimed not only possession but mesne-profits. The Subordinate Judge rejected the latter claim. Their Lordships are of opinion that, as the deeds of sale are not good as such, the claim for mesne-profits is well founded. In argument it was conceded that on the other side of the account interest at 6 per cent., should be allowed on the sums credited to the first respondent. The amounts thus to be allowed on the one side and on the other can be adjusted in execution proceedings.

Their Lordships will humbly advise His Majesty that the appeals should be allowed, that the decrees of the High Court should be discharged with costs to be paid as regards the first decree by the present respondents other than Sowton, and as regards the second decree, by the first respondent, that the decrees of the Court of the Subordinate Judge should be

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discharged, and that instead thereof it should be ordered that upon the first appellant paying to the first respondent the sums found in favour of the latter by the Subordinate Judge with interest at 6 per cent., per annum the first appellant do recover possession of the property in suit together with mesne-profits to be ascertained in execution proceedings and costs to be paid by the first party defendants in the first suit and by the sole defendant in the second suit.

The respondents other than Sowton will pay the costs of these appeals.

Messrs. Withall & Withall :—Solicitors for the Appellants.

Messrs. T. L. Wilson & Co. :—Solicitors for the Respondents other than Sowton.

J. M. P.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

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Indian Penal Code (Act XLV of 1860), Secs. 99, 147—Right of private defence—Time to have recourse to the public authorities—Person in possession of property—Rioting.

There is no right of private defence where there is time to have recourse to the public authorities.

Where both parties arm themselves for a fight to enforce their right or supposed right and deliberately engage in very large numbers in a pitched battle, killing one man and wounding others, the questions as to who began the attack and who were in possession of the property, do not arise.

The law does not delegate to any private individual the functions of those public officers who are specially charged with the protection of life and property.

No one has a right to assemble in large numbers and court an attack by an opposing party. In such a case the right of private defence does not exist.

Appeal by the accused persons.

Conviction for rioting.

The facts and arguments appear sufficiently from the judgments.

Mr. Eardley Norton and Babu Manmatha Nath Mukerji for the Accused.

Mr. P. L. Roy and Babu Joy Gopal Ghosha for the Crown.

C. A. V.

The following judgments were delivered :

Rampini J.—This is an appeal by 12 persons who have been convicted by the Sessions Judge of Patna of offences under sections 147 and 148, Penal Code, and sentenced to terms of imprisonment varying from 1 to 2 years. The trial was held with the assistance of a Jury, who unanimously found the accused guilty. The verdict of a Jury can only be set aside on the ground of mis-direction in the charge by the Judge to the Jury, which has in fact occasioned a failure of justice. The alleged facts of this case are set out by the Judge as follows :—" On the morning of the 10th March, Fakira Dhari, one of the Chowkidars of Iswa, saw a mob collected on the Pathari pyne, and learnt that they

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* Criminal Appeal No. 904 of 1907 against the judgment of Mr. H. W. O. Carnduff, Sessions Judge of Patna, dated the 30th September 1907.

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were Chero people come to throw up an along on the western side,—taking earth from the then dry channel in order to do so ; also that the Iswa people intended to contest the other's right to do anything of the kind. He at once went to the Sur-mera out-post and gave information to the writer-constable who was there alone, and could do no more than record a *sancha* on hearing what he and another Chaukider Budhna, who had come almost simultaneously with similar information, had to say. Budhna was sent off to Shukhpura in Monghyr to give formal information to the Head Constable, Narul Nabi, who had gone there to attend a police co-operation meeting, while two constables, Rajkumar and Suraj Nath, were deputed to accompany Kakira back to the pyne and avert a riot, if possible. On reaching the place they found some 500 Chero people armed with *lathies* and swords, among them being about 200 labourers, excavating the earth, and most prominent of all, Kabiruddin directing operations (from horse back eventually), but himself unarmed. At the same time a slight smaller *Gahar*, 300 or 400 are the figures suggested, was seen coming from the Iswa side led by Sahdeo Singh of Iswa, also on horse back, armed and shouting "Jai Mahabir." The police implored the Chero people first, and then the Iswa people, and then both together to desist and await the arrival of the Sub-Inspectors : but remonstrances were in vain, the two armies ranged up, and a free fight ensued and lasted for a short time, after which the rioters on both sides dispersed. It was then noticed that one of the Iswa men had been so severely wounded as to be unable to move from the spot where he had fallen. This man, Mohor Singh, the Chero people are said to have made an attempt to carry away, and the Iswa people, according to the police, also tried to remove him altogether ; but the constables very properly refused to let him be taken out of their sight, and they were present with him when he died in a hut hard by about a quarter of an hour later."

The Judge has then discussed the evidence very carefully and left the Jury to make up their minds as to the facts. He then goes on to say : "I now come to deal with the question of right, title and possession, as to which a mass of evidence has been laid before you. First, there is the oral evidence on the Iswa side a number of witnesses swear that the Pathari pyne lies entirely in Iswa, that it has always been repaired and maintained by the maliks of Iswa, and that the people of Chero have never had, nor exercised any right to interfere with it in

any way. On the other hand, the Chero witnesses allege that the Chero people have regularly excavated earth from the pyne so as to erect an *alung* along the western side, and it is argued, on the strength of certain admissions by Iswa witnesses as to the slope of the land, that, without such an *alung*, Chero could never grow a rice crop, as all the water would flow off their lands during the rainy season. Then Iswa produces a *thakbust* map of 1843, which seems to show that the northern branch at any rate of the pyne, *i.e.*, the so-called Pathari Pyne is in Iswa, while Chero produces a similar map and *Khasra*, and the counsel for the defence asks you to gather from it that in 1843 the pyne was in Chero. Next the prosecution rely upon certain partition proceedings in 1901 between Iswa and Kalyanpur, but to these Chero admittedly was no party. Chero again file a number of old *rubakars* or decrees regarding a pyne apparently in their locality but these relate to a dispute between Chero and Iswa, and I cannot myself see that the identity of the pyne referred to in them with the so-called Pathari pyne has been established. Next there are Treasury *chalans* showing that Mussamut Fasihān, the Chero malika, has paid into the Treasury at Patna in the years 1884, 1889, 1892, 1894, 1896, 1897 and 1901, sums of money on account of "Bandheri" and the "Sakri Band." And lastly, each side has produced *gilandazi* papers and evidence in support thereof, while the defence have called a *beldar* who swears that he has repaired the pyne at the expense and on behalf of Chero.

The task of deciding what, in the result, is established by this conflict of evidence would, I think, be a difficult one, and in the view I take of the law, it is not necessary for you to attempt an adjudication. In a word, I am clearly and strongly of opinion that, if the case of a free fight deliberately engaged in by the parties is true, it is wholly immaterial what their rights were or are. This brings me to an exposition of the law of rioting.

An assembly of five or more persons is an unlawful assembly, if the common object of the persons composing it, is by means of criminal force or show of criminal force to any person, to enforce any right or supposed right. And an assembly, which was not unlawful when it assembled, may become an unlawful assembly, whoever intentionally uses force to any person without that person's consent in order to the committing of any offence, or intending by the use of such force to cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other, whenever force or violence is

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used by an unlawful assembly, or by any member thereof, in prosecution of its common object, every member of it is guilty of rioting under section 147 of Indian Penal Code. And if any person so guilty is armed with a deadly weapon or anything, which used as a weapon of offence is likely to cause death, he is liable to severe punishment under section 148.

In order, then, to convict any one of the accused under section 148, you must be satisfied :

(1) That he was one of five or more persons assembled with a common object.

(2) That the common object was forcibly to assert the supposed right of Chero to take earth from the Pathari pyne.

(3) That in prosecution of that common object, force or violence was actually used, and

(4) That he was armed with a deadly weapon.

As I have already told you, it is a question of fact whether a sword or a *lathi* is a deadly weapon, and that is for you to decide. I have also told you in the case of Kabir, and I repeat it now once for all, that even if you find point (4) above not proved, it will be open to you to convict under the minor section 147, should you find the other essentials proved.

Now apart from the *alibi* pleaded by some of the accused, the defence is that the Chero people were not asserting any right but were merely maintaining undisturbed the exercise of a right, and taking the necessary precautions to protect themselves from aggressive interference, and the learned counsel has cited a number of rulings drawing the distinction referring, in particular, to one of 1875 and another of 1897, *Shunkur Singh v. Burmah Mahto* (1), and *Pachkauri v. Queen Empress* (2). Now, even if the soundness of these decisions be accepted unquestioned, and I cannot help thinking that the case of 1897 goes dangerously for in the direction of allowing the subject to take the law into his own hands, the present case seems to me to be readily distinguishable. And here I ought to remind you that, where the right of private defence is set up, the *onus* shifts on to the accused and it is for them to prove the plea.

In laying down the law I rely, first, on the clear language of section 141 (4) which refers to an actual right as well as a supposed one, and, then, on a long series of rulings which begin with the *Queen v. Fealall* (3) and ends with *Anant Pandit v.*

(1) (1875) 23 W. R. Cr. R. 25. (2) (1897) 1. L. R. 24 Calc. 686.

(3) 1867) 7. W. R. 34.

Madhu Sudan Mandal (1). There can, I tell you, be no right of private defence, either on one side or on the other, where both parties are evidently aware of what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who, expecting to be attacked go out of their way to court an attack. Where the parties of the complainant and accused are prepared to fight, it is immaterial who was the first to attack, unless it be shewn that the accused were acting in the exercise of the right of private defence. If the accused, it was held by the Judges at Allahabad not many years ago, [see *Queen Empress v. Prag Dat* (2)], were determined to vindicate their supposed rights and engage in a fight with men equally determined to vindicate them, no question of private defence can arise. It comes to this simply, that our law does not permit rival claimants to enter in cold blood into battle to settle a dispute which can be settled in a lawful manner. Here you must remember that the occurrence took place on the 10th March, six months after the last rains had ceased and three months before the next rains were expected. There would, therefore, be no pressing necessity for the erection of an *alung*. On the contrary, not only was there plenty of time to seek the protection of the police at the out-post a mile distant, but the police were on this spot, if you believe them trying to prevent a breach of the peace : there was plenty of time to ask the Magistrate at Bash to issue an order under section 144 of the Code of Criminal Procedure so as to enable the Chero people to put up the *alung* before the rains, there was time, indeed, to bring a suit to establish the right. And what was there to prevent them waiting until the Settlement Officer arrived and went into the matter on the spot with a view to the Record of Rights contemplated ? If you find that the accused well knew that the right was disputed and would be forcibly contested by Iswa, that they nevertheless went in anything like the number asserted to exercise the right in the teeth of opposition, that there was no necessity or justification in the patent facts for their taking the earth and throwing up the *alung* at the time in question, and that they joined battle in the face even of police-remonstrance on the spot, then you should, without hesitation, convict all who participated of rioting."

Mr. Norton for the appellants contends that in this passage in the Judge's charge, there is a flagrant misdirection on a point of law and that, therefore, the conviction of the appellants cannot

(1) (1899) I. L. R. 26. Calc. 574.

(2) (1898) I. L. R. 20 All. 459.

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stand. He urges that the Judge should not have told the Jury that when two bodies of armed men go out to fight a pitched battle, defying the representatives of the law that are present, and urge them to desist from fighting, the questions of right and who are the aggressors are immaterial, but on the contrary that the Judge should have directed the Jury to find (1) who were in the possession of the pyne about which the fight took place (2) by what right they were in possession, and (3) who were the aggressors and the attacking party at the time of the occurrence. In support of his contention he has cited and relied on the following cases : *Queen v. Sohun and Samoo* (1), *Queen v. Mitto Singh* (2); *Queen v. Sachee* (3); *Birjoo Singh v. Khub Lall* (4), *Shunkur Singh v. Burmah Mahto* (5), *Ganauri Lall Das v. Queen Empress* (6), *Mohes Sheikh v. Queen Empress* (7), *Pachkauri v. Queen Empress* (8), *Anant Pandit v. Madhusudan Mandal* (9), *Poresh Nath Sircar v. Emperor* (10), *Bepin Behari Guha v. Pranukul Majumdar* (11), *Queen Empress v. Narsang Pathabhai* (12), and *Queen Empress v. Pulimuthu Tevan* (13). Mr. Roy for the Crown on the other hand, has replied that the Judge's charge contains no mis-direction, that the Judge has correctly laid down the law, and that, as no failure of justice has in fact taken place in consequence of the alleged misdirection, the conviction of the appellants according to section 537, Criminal Procedure Code, should not be set aside. He relies on the cases of *Queen v. Nowabdee* (14), *Queen v. Feolall* (15), *Queen v. Mana Singh* (16), *Kalee Beparee and others* (17), *Queen Empress v. Prag Dat* (18), *King Emperor v. Kaliji* (19), *Emperor v. Kadhu Singh* (20), and an unreported case, *Jairam Mahton v. Emperor* decided by Mitter and Caspersz JJ. on the 15th July 1907.

There appears to me to be no necessity to discuss these cases at length. They lay down no general rule. Further, they have all been considered and commented on from time to time by the different Benches of this Court, and the facts of each case distinguished. They undoubtedly appear to be conflicting, and Mr. Norton has suggested that if we do not agree with the law as

- (1) (1865) 2 W. R. Cr. R. 59.
- (2) (1865) 3 W. R. Cr. R. 41.
- (3) (1887) 7 W. R. Cr. R. 112.
- (4) (1878) 19 W. R. Cr. R. 66.
- (5) (1875) Cr. R. 23 W. R. 25.
- (6) (1889) I. L. R. 16 Calc. 206.
- (7) (1893) I. L. R. 21 Calc. 392.
- (8) (1897) I. L. R. 24 Calc. 686.
- (9) (1899) I. L. R. 26 Calc. 574.
- (10) (1906) I. L. R. 33 Calc. 295.

- (11) (1906) 11 C. W. N. 176.
- (12) (1890) I. L. R. 14 Bom. 441.
- (13) (1900) I. L. R. 24 Mad. 124.
- (14) (1864) Gap No. W. R. Cr. R. 11.
- (15) (1867) 7 W. R. Cr. R. 34.
- (16) (1867) 7 W. R. Cr. R. 103.
- (17) (1878) 1 C. L. R. 521.
- (18) (1898) I. L. R. 20 All. 459.
- (19) (1901) I. L. R. 24 All. 143.
- (20) (1902) I. L. R. 24 All. 298.

laid down in the cases he has cited, we should make a reference to a Full Bench. But we see no reason and consider it unnecessary to do so. The law of the Penal Code, however, apparently—variously interpreted in different sets of circumstances, remains the same and we are bound to apply it to the circumstances of the present case according to our lights. I have no doubt that according to the Penal Code no right of private defence arises in circumstances such as those of the present case, when both parties armed themselves for a fight, to enforce their right or supposed right and deliberately engaged in very large numbers in a pitched battle, killing one man and wounding others. In such a case, as said in the exactly similar case of *Kali Beparee* (1) where both parties are armed and prepared for battle, and it is not shown that they were acting within the legal limits of the right of private defence, it does not matter which is the first to attack. In the present case, the appellants if they had any right of private defence, which in the circumstances in my opinion they had not—did not act within the legal limits of such right. They did not restrict themselves merely to the use of such force as was necessary to resist trespass. On the contrary, they far exceeded their right, if they had any, for they killed a man and inflicted serious injuries on others, as has been said in the unreported case of *Jairam Mahton v. Emperor* :—"The right of private defence of property is a restricted right. Section 99 of the Indian Penal Code expressly lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities, and it, also, lays down that the right of private defence in no case extends to doing more harm than is necessary for the purpose of defence. Sections 100 to 105 make the right depend on the circumstances of each case. No man has the right to take the law into his own hands for the protection of his person or property, if there is a reasonable opportunity of redress by recourse to the public authorities. Referring to *Hyde v. Graham Holloway J.*, in Madras High Court Proceedings, 8th January 1873 says : "The natural tendency of the law of all civilized states is to restrict within constantly narrowing limits the right of self help, and it is certain that no other principle can be safely applied to a country (like this)....." The right of self help, when it causes, or is likely to cause, damage to the person or property of another person must be restricted, and recourse to public authorities must

(1) (1878) 1 C. L. R. 521.

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be insisted on. If a person prefers to use force in order to protect his property, when he could, for the protection of such property, easily have recourse to the public authorities, his use of force is made punishable by the Indian Penal Code. No matter what the intention of that person may be, the law says that he must not use force in such a case. To hold otherwise would be to encourage and put a premium on offences of rioting which are so frequent in this part of India. The country would in the language of Holloway J., "be deluged with blood," if an offender who could get relief by recourse to law were allowed to take the law into his own hands."

For these reasons, I am of opinion that there was no misdirection in the charge to the Jury by the Sessions Judge, and I would accordingly dismiss the appeal.

Sharfuddin J.—This is an appeal by the present appellants who have been convicted and sentenced as mentioned by my learned brother in his judgment. The trial was held with the assistance of a Jury whose unanimous verdict was that all the accused were guilty.

The facts of the case have been fully discussed by the learned Sessions Judge in the heads of his charge to the Jury and also dealt with by my learned brother. I need not, therefore, repeat them.

It has been urged on behalf of the appellants that there has been misdirection in the charge on a point of law, namely that "in the case of a free fight deliberately engaged in by the parties, it is wholly immaterial what the rights were or are." And that the misdirection has been further amplified by the learned Sessions Judge by directing the Jury "that there can be no right of private defence either on one side or the other, when both parties are evidently aware what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and the accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of their right of private defence."

Mr. Norton, counsel for the appellants, contends that the above amounts to a misdirection inasmuch as the learned Sessions Judge was bound to place before the Jury the evidence as to possession; and that this omission has caused a miscarriage of justice, for, if the Jury had found possession of his clients

even for a few hours before the occurrence, they had a right to defend their possession against any aggression by the other side.

The Indian Penal Code deals with the right of private defence in sections 96 to sections 106. Under section 97 "every person has a right subject to the restrictions contained in section 97, to defend his property or that of any other person against any act which is an offence falling under the definition of offences mentioned in that section. One of the restrictions under section 99 is that "there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities." By the above restriction an accused cannot set up this right with regard to properties in his possession, if he has time to invoke the protection of the authorities. In cases of sudden fights where there has not been any preparation by either side, a man, no doubt, is within the law, if in defending his property he causes such bodily injuries to the aggressive party as are allowed by the sections of the Penal Code which deal with the right of private defence.

If the facts of the present case disclose a state of things which clearly goes to show that the accused had full knowledge of the fact that they would be opposed by the other side, their duty, as required by law, would be to have recourse to the protection of the authorities, provided there was time, enough to do so. If there was time, they had no right to go to the scene of occurrence and thus invite the other side to come and attack them. The occurrence is said to have taken place on the 10th March, 1907, when the Pathuri pyne was quite dry. The accused had gone to the place to repair the embankment of the said pyne, which embankment is situated on the Chero side of the pyne. Chero is the village to which the accused belong. The opposing party belong to the village Iswa. On the date of the occurrence, there was no pressing necessity to throw up any earth on the Chero side of this pyne, the rainy season being some months after the occurrence.

From facts proved in the case and accepted by the Jury, it is clear that the Chero people were fully aware that they would be attacked by the Iswa people. The Chero people numbered about 400 or 500 including about 200 labourers. They were armed with swords and *lathies* and were led by Kabiruddin on horse-back, who had only a whip in his hand. On the appearance of such large body of men, the Iswa people also began to collect their forces. In the meanwhile two chaukidars started

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for the Thana, which is only 4 miles from the scene of occurrence, and only a mile from Chero, to give information of a likelihood of a breach of the peace. On receipt of the information two police constables arrived on the spot before the fighting had commenced. In spite of the remonstrances of these two constables, fighting began and there was a regular combat. This fighting commenced on the Iswa people trying to cross the pyne.

On the above facts, it is clear that the Chero people had full knowledge that they would be opposed by the Iswa people, and this is evidenced by the fact of their having gone fully armed and in such large numbers. An assembly of such a large body of men indicates that they had not gone to the spot for any peaceful purpose. They knew quite well that they would be attacked and they went to the spot to meet force by force. The law does not delegate to any private individual the functions of those public servants who are specially charged with the protection of life and property, and the apprehension of offenders. In the present case there having been no pressing necessity for repairing the embankment and there being ample time to seek protection of the authorities, the Chero people had no right to assemble, as they did, and court an attack by the Iswa people.

It is contended on behalf of the appellants that inasmuch as the Chero people had arrived on the spot admittedly a few hours before the Iswa people, the former had a right to defend the continuance of a state of things which, if altered, would have disturbed the *status quo ante*, and that the Chero people having arrived there first, were maintaining their right of possession. The common object mentioned in the charge is to support a supposed right to take earth from the Pathuri pyne. The question, therefore, is as to whether the Chero people had gone to the spot to defend a right or to assert it. It is clear that that they had gone to assert that right, or otherwise there would have been no necessity of going to the place in such a large body and so armed. It is contended on behalf of the appellants that they having arrived on the spot first had the right to remain there and if disturbed in that right they were entitled to set up the plea of the right of private defence. I cannot accept the above proposition as such an enunciation of law would be dangerous to the peace of the country. It would justify a regular race between two factions as to who should arrive first.

In the above circumstances, I am of opinion that the learned Sessions Judge was right in telling the Jury, that if they found (a) that there had been a premeditated fight between the parties ; (b) that the remonstrances of the two constables were ineffectual ; (c) that there was no pressing necessity to repair the pyne ; and (d) that there was ample time to seek the protection of the authorities, it was immaterial as to which of the parties was in possession.

One of the common objects mentioned in section 141, Indian Penal Code, is—" by means of criminal force or show of criminal force to any person to take or obtain possession of any property or to deprive any person of the enjoyment of the right of way or of the use of water or other incorporeal right of which he is in possession or enjoyment, or *to enforce any right or supposed right.*" The expression " to enforce any right or supposed right " suggests an opposing party, and hence I find that the accused have been charged with rioting with the common object, to wit, to assert by force or show of force a supposed right.

Our attention has been drawn by counsel on both sides to various authorities in support of their respective contentions. They have been referred to by my learned brother in his judgment and I need not discuss them.

For the above reasons, I concur with my learned brother and dismiss this appeal.

N. K. B.

Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

ARJU MEA AND ANOTHER

v.

ARMAN MEA AND OTHERS.*

*Criminal Procedure Code (Act V of 1898), Sec. 145—Title—Possession—
Handing over profits to party.*

In a case under section 145, the Magistrate has no jurisdiction to enquire into the rights of parties. What he has got to look to is the fact of possession only.

A Magistrate in a case under Sec. 145 passed the following order :—" I further order that if any fruit has been gathered on any of the said land

* Criminal Revision No. 1422 of 1907 against an Order of H. A. Street, Esq., Sub-divisional Magistrate of Hailakandi, Cachar, dated the 21st September, 1907.

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attached by order of this Court, the proceeds of such fruit, minus expenses, shall be handed over to A."

Held, there is no authority in section 145 or any other section to justify such an order.

Rule obtained by the First party.

Proceedings under Sec. 145 of the Criminal Procedure Code.

The material facts appear from the judgment.

Babu Narendra Kumar Basu (for Babu Kamini Kumar Chanda) for the Petitioners.

Moulvi Nuruddin Ahmed for the Opposite Party.

The judgment of the Court was delivered by

Rampini J.—This is a Rule, calling upon the District Magistrate of Cachar and also upon the opposite party to show cause why the order of the Sub-Divisional Magistrate of Hailakandi, declaring the 2nd party to be in possession of the land in dispute, should not be set aside.

The order runs as follows :—"For all the above reasons, I hereby order that all the interest of Asu deceased in the said 11 plots (Nos. 248, 250, 259, 621, 626, 502, 511, 489, 564, 326, and 474) shall remain in the possession of Arman Mea, or his *paikasta* until or unless he is legally ousted therefrom by a competent Court.

"I further order that if any fruit has been gathered on any of the said lands attached by order of this Court, the proceeds of such fruit, minus expenses, shall be handed over to Arman Mea."

Now, it is clear from this order that the learned Sub-Divisional Magistrate has not made an enquiry into what he should have enquired into, namely, the fact of actual possession. He has written a very long and confused judgment and has devoted much time to the discussion of the question of the rights of the parties. If, however, he had taken the trouble to read section 145 of the Code of Criminal Procedure before passing his order, he would have learnt that his duty was, not to enquire into the rights of the parties, but into the fact of actual possession. He has not done so; and in his final order he has not come to any finding as to actual possession. He says, "For the above reasons I hereby order that all the interest of Asu, deceased, in the said 11 plots shall remain in the possession of Arman Mea, or his *paikasts*." But he does not say that they have been in possession before. And then he goes on to say :—I further order that

if any fruit has been gathered on any of the said lands attached by order of this Court, the proceeds of such fruit, minus expenses, shall be handed over to Arman Mea." There is no authority, in section 145, Code of Criminal Procedure, or any other provision of the Code of Criminal Procedure, to justify such an order.

We, therefore, set aside the order of the Sub-Divisional Magistrate and make this Rule absolute.

N. K. B.

Rule made absolute.

Before Mr. Justice Caspersz and Mr. Justice Chitty.

ABDUL RAHMAN

v.

THE EMPEROR.*

Criminal Procedure Code (Act V of 1898), section 476—Order for prosecution—Indian Penal Code (Act XLV of 1860), section 211—False charge, laying of—Charge laid before the Police—Police report, directing charge as false—Judicial enquiry, order directing—Procedure.

A criminal proceeding was instituted by a person before the Police who reported the case to be false, and the matter coming on before a Magistrate empowered to dispose of Police reports, he made an order making over the case to another Magistrate for judicial inquiry. This Magistrate after holding a judicial inquiry as directed submitted a report, upon which the other Magistrate made an order to the following effect, *viz* :—

"The complainant's charge has been established to be false and hence no process shall be issued against the accused and the complainant shall be proceeded with under section 211, Indian Penal Code" and upon prosecution of the complainant she was convicted under section 211 of the Penal Code :

Held, that the offence of instituting a false complaint not having been committed before the Magistrate who ordered the prosecution of the petitioner, or brought to his notice in the course of judicial proceedings, the prosecution of the petitioner was bad and contrary to law and the proceedings must be quashed.

Held also, that the proper course, in such a case, should have been to direct the Police to lodge a complaint.

Haibat Khan v. The Emperor (1) followed.

Rule obtained by the Accused.

Conviction of an offence under section 211 of the Indian Penal Code for instituting a false complaint.

The facts of the case appear from the abstract of the judgment of the Sessions Judge given below.

* Criminal Revision No. 1110 of 1907 against an Order of F. Roe, Esq., Sessions Judge of Hooghly, dated the 6th August 1907, affirming that of Babu Chandra Sekhar Kar, Deputy Magistrate of Hooghly dated the 17th July 1907.

(1) (1905) I. L. R. 33 Calc. 30.

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"Before dealing with the facts of this case it is necessary to deal with four questions of procedure raised by the appellants.

1. That the first information of the charge having been laid by the appellant to the District Superintendent of Police his conviction on a charge of having falsely instituted a criminal proceeding before the Sub-Inspector in charge of the Thana is bad.

This ground is without force. The District Superintendent has no power to institute criminal proceedings on complaint. The charge laid before him instituted no proceedings. Proceedings were instituted only when the officer in charge of the Police station recorded the appellants information.

2. That the sanction given for the prosecution is bad in law. It is given in the following words :

"The complainant's charge has been established to be false and hence no process shall be issued against the accused and the complainant shall be proceeded with under section 211, Indian Penal Code." This order was passed by the Deputy Magistrate empowered to dispose of Police Reports. It disposes finally of the appellants' information to the Police, and it formally sanctions his prosecution. It is, therefore, a good and valid order."

Babu Dasarathi Sanyal for the Petitioner.

Mr. Douglas White (Deputy Legal Remembrancer) for the Crown.

The judgment of the Court was delivered by

Caspersz J.—This is a Rule calling on the Magistrate of the District to show cause why the conviction and sentence passed upon the petitioner should not be set aside on two grounds, *first*, that the Deputy Magistrate, Babu Khagendra Nath Mitter had no jurisdiction to pass an order under section 476, Code of Criminal Procedure, directing the prosecution of the petitioner, and *secondly*, on the ground that the case was disposed of by the Magistrate on the 17th July without hearing the defence and on a date previous to that already fixed by him.

We do not think it necessary to deal with the second ground as in our opinion this Rule must be made absolute on the first ground. The facts of the case are on all fours with the case of *Haibat Khan v. Emperor*. (1) The learned Deputy Legal Remembrancer, whom we desired to hear in the matter of this Rule, admits that he cannot distinguish that case from the

(1) (1905) I. L. R. 33 Calc. 30.

present case. It is quite plain that the charge preferred by the petitioner having been reported to be false, the matter was made over to Babu A. K. Mukerjee for judicial inquiry and it cannot be said that the offence was committed before Babu Khagendra Nath Mitter or brought to his notice in the course of judicial proceedings. The proper course, as appears to us, should have been to direct the Police to lodge a complaint, but the procedure actually adopted being contrary to law and the reported decision of this Court referred to above, we are constrained to make this Rule absolute and to quash the proceedings. The petitioner will be discharged.

B. M.

Rule made absolute.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

DHARMADAS KAWAR AND ANOTHER

v.

KING EMPEROR.*

Sanction to prosecute—Criminal Procedure Code (Act V of 1898), sections 195, 476—False information—Indian Penal Code (Act XLV of 1860), section 211—Requisites of sanction—Criminal Procedure Code, section 195 (4).

A false information was given at the Thana regarding the death of a girl. The informant, the chowkidar was directed to be prosecuted under sections 182 and 211 of the Indian Penal Code.

On an application by the opposite party, the Sessions Judge sanctioned the prosecution of two other persons by the following order :—

"There can be no doubt that D. and A. instigated the chowkidar to lodge this information. I direct that they be prosecuted under section 211 with the chowkidar :"

Held, the sanction was without jurisdiction and bad.

Rule obtained by the Accused:

Sanction to prosecute.

The material facts and arguments appear from the judgment.

Babus Dasarathi Sanyal and Suresh Chandra Mukherji for the Petitioners.

Babu Atulya Charan Bose for the opposite Party.

C. A. V.

The following judgment was delivered :

Rampini J.—This is a Rule to show cause why the order of the Sessions Judge dated the 3rd December 1907 directing the prosecution of the petitioners for an offence under section 211, Indian Penal Code, should not be set aside.

*Criminal Revision No. 1493 of 1907 against an Order of F. Roe Esq., Sessions Judge of Hooghly, dated the 3rd December 1907.

CRIMINAL.

1907.

Abdul Rahman

v.

The Emperor.

Casperz, J.

CRIMINAL.

1908.

January, 22, 24,

January, 24.

CRIMINAL.

1908.

Dharmadas Kavar

r.
King Emperor.Rampizi, J.

The order of the Sessions Judge is as follows :

"There can be no reasonable doubt that Dharmadas Kavar and Awlat Kayal instigated the chowkidar to lodge this information. I direct that they be prosecuted under section 211 with Khetra Duby."

The facts are that false information of the murder of a girl was lodged at the Thanah, by a chowkidar named Khetra Duby. The Police made an enquiry and reported the case to be false. The Magistrate passed the following order :—"From the evidence on record it is clear that the girl died a natural death at her husband's place, and I suspect that the girl's father-in-law having refused to give her ornaments to her father, the latter wanted to make a row, but the *gomastha* having intervened the ornaments were given to the girl's father and the enemies of the *gomastha* caught hold of this opportunity and induced the chowkidar to make a false report to the Police. The case shall be entered false and no processes shall be issued against the accused. In his information to the Police, however, the chowkidar took all the responsibility upon himself. He shall, therefore, for the present be alone prosecuted under sections 182 and 211, Indian Penal Code."

The complainant Abdul Jabbar then applied directly to the Sessions Judge for sanction to prosecute the petitioners Dharmadas Kavar and Awlat Kayal who, it is alleged, induced the chowkidar to give the false information to the Police.

The legality of the Sessions Judge's order is impugned on the grounds (1). That if it be a sanction under section 195 (b), Criminal Procedure Code, he had no jurisdiction to grant it, as no offence under section 211 had been committed in or in relation to any proceeding in any Court. (2) That if it be an order under section 476, Criminal Procedure Code, it is bad for a similar reason and (3) that the order of the Sessions Judge is not in conformity with the provisions of section 195, sub-section (4), Criminal Procedure Code. These grounds must prevail. The offence, if any, was committed before the Police and not before any Court, or in the course of any judicial proceeding or of any proceeding in any Court. The Sessions Judge had, therefore, no jurisdiction to make it, either under section 195 (b) or section 476, Criminal Procedure Code. Further in the order not the slightest attempt has been made to comply with the provisions of section 195, sub-section (4).

It is much to be regretted that more care is not taken by Judicial officers in the granting of sanction to prosecute for

offences against public justice. Much time and labour are at present wasted owing to easily avoided irregularities in the granting of such sanctions.

We make the Rule absolute and set aside the Sessions Judge's order as prayed.

N. K. B.

Rule made absolute.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

MAHADEO LAL

v.

KING EMPEROR.*

Indian Penal Code (Act XLV of 1860), Secs. 417, 511—Attempt at cheating—False representation to pleader—Damage or harm in mind, reputation—Complainant, position of.

Where A falsely representing himself to be a member of the firm of B, which firm were clients of a pleader C, went to the pleader and instructed him to write a letter on behalf of B, cancelling a certain contract and where C, wrote the letter but instead of despatching it to the addressee sent it to B's shop where the fraud was discovered :

Held, the despatch of the letter would have caused injury to the pleader in mind and reputation, he would certainly have been likely to lose reputation, and perhaps business, if it appeared that he had been negligent and had been readily deceived.

Held, therefore, that A was rightly convicted of attempt at cheating.

The prosecutor in all Criminal cases is really the Crown ; the complainant merely sets the machinery of the Court in motion. In a case of cheating, it is not necessary that the complainant should have been the person deceived.

Rule obtained by the Accused.

Conviction for attempt at cheating.

The facts of the case were as follows :

On the 23rd September 1907, the accused called at the firm of Jagru Balabux and entered into a contract with them for delivery of certain piece goods, on behalf of Messrs. Birkmyre Bros. Some days later the firm asked for delivery, which was refused on the ground that there was no contract. On the 12th October, the firm caused a letter to be written to Birkmyre Bros. through their pleader Babu Srish Chandra Bose of the Presidency Small Cause Court tendering price and asking for delivery. Subsequently on the 24th October 1907, the accused went to Babu Srish Chandra Bose and representing himself to be a member of the firm, his client, induced him to write a letter to Messrs.

* Criminal Rule No. 1504 of 1907 against the decision of D. H. Kingsford, Esq., Chief Presidency Magistrate, Calcutta, dated the 20th December 1907.

CRIMINAL.

1908.

Dharmadas Kavar

v.

King Emperor.

Rampini, J.

CRIMINAL.

1908.

January, 22, 24.

CRIMINAL.

1908.

Mahadeo Lal
v.
King Emperor.

Birkmyre Bros. cancelling the contract. Srish Babu before despatching the letter grew suspicious and sent it to his clients and the fraud was discovered.

On the 28th October, one Dhanraj, a servant of the firm of Jagru Balabux lodged a complaint before the Chief Presidency Magistrate and after a Police investigation, the accused was put upon his trial for attempting to cheat Babu Srish Chandra Bose, convicted and sentenced to undergo rigorous imprisonment for one month and to pay a fine of Rs. 50.

Hence this Rule.

Mr. Garth, Mr. Pugh and Babu Manmatha Nath Mookerjee for the Petitioner.

Mr. Sinha and Babu Chandra Sekhar Banerji for the Complainant.

C. A. V.

The following judgment was delivered :

January, 24.

This is a Rule to show cause why the conviction and sentence passed on the petitioner by the Chief Presidency Magistrate should not be set aside.

The facts are that the accused arranged a contract for the delivery of goods to the complainant's firm by Messrs. Birkmyre Brothers for whom he had no authority to act. The contract was repudiated by the latter firm as invalid. The complainant's firm pressed their claim under the contract, and instructed a pleader named Srish Babu to write to Messrs. Birkmyre Brothers and demand fulfilment. Then the accused finding that his fraud in connection with the contract was likely to be discovered went to the pleader Srish Babu, represented himself to be a member of the complainant's firm, which he was not, and instructed him to write a letter in the name of the complainant's firm to Messrs. Birkmyre Brothers stating that the contract which the complainant's firm had entered into had been cancelled. The pleader wrote the letter but before despatching it referred to the complainant's firm and the accused's fraud was discovered.

The grounds on which we have been asked to set aside the conviction are (1) that the accused has been convicted of attempting to cheat not the complainant but the pleader Srish Babu ; (2) that the act of the accused did not likely to harm the pleader in any way.

The first of these grounds cannot prevail, because the prosecutor in all criminal cases is the Crown. The Presidency Magistrate is entitled to convict an accused of any offence which the evidence given before him discloses he has committed. The

accused was put on his trial for attempting to cheat the pleader. A charge for attempting to cheat the pleader was duly drawn up against him. He pleaded to this charge and had every opportunity afforded him to defend himself against this charge.

Then, it would seem to us that his act does amount to an attempt to cheat the pleader. He made a very false representation to him. He caused him to write a letter to Messrs. Birkmyre Brothers which the pleader would not have written if, it had not been for the false representation made to him by the accused. If this fraud had been successful it must necessarily have caused injury to the pleader in mind and reputation. The pleader would certainly have been likely to lose reputation, and perhaps business if it appeared that he had been negligent and had been readily deceived by the accused. He might also have found himself involved in litigation. We see no reason to interfere. We affirm the conviction. We, however, think the sentence may be commuted into one of fine. We accordingly commute the sentence into one of fine to the extent of Rs. 500 in all, or one month rigorous imprisonment in default of payment of fine.

N. K. B.

Conviction affirmed; sentence commuted.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

GOSTHO BEHARI SAHA AND OTHERS

v.

KING EMPEROR.*

Bengal Excise Act (VII of 1878 B. C.), Secs. 53, 61, 59—Ganja, being in possession of—Sale without license—Contravention of condition of license—Master and servant.

A person who is licensed to sell *ganja* at one place would be guilty under section 59 and not under sections 53 and 61 of the Bengal Excise Act, if he is found to have been in possession of a large quantity of *ganja* and to have sold a part of the same at another place. His servant would in such a case not be guilty of any offence.

Rule obtained by the Accused persons.

Prosecution under the Excise Act.

The facts and arguments appear from the judgment.

Babus Dasarathi Sanyal and Suresh Chandra Mukerji for the Petitioners.

Mr. Douglas White (Deputy Legal Remembrancer) for the Crown.

C. A. V.

* Criminal Revision No. 1239 of 1907 against the Order of H. Foster Esq., District Magistrate of Birbhoom, dated the 23rd July 1907, affirming that of Babu Bejoy Behari Mukerji, Deputy Magistrate, dated the 15th June 1907.

CRIMINAL,

1908.

Mahadeo Lal

v.
King Emperor.

Rampini, J.

CRIMINAL,

1907.

December, 11, 12, 17.

CRIMINAL.

1907.

Gostho Behari Saha

v.

King Emperor.

December, 17.

The judgment of the Court was delivered by

Rampini J.—The petitioners Gostho Behari Saha and Fakira Saha have been convicted of offences under sections 53 and 61 of the Excise Act, *i.e.*, of selling and possessing *ganja* without a license and have been each sentenced to pay a fine of Rs. 200 under each section. The first petitioner is a licensed vendor of exciseable articles and the second is a servant of the first petitioner.

The Rule was obtained on the following grounds : (1) that the District Magistrate, Mr. Foster who heard the petitioners' appeal had, as Collector directed their prosecution, (2) that Fakira as servant is not liable for the act of his employer, (3) that the Deputy Magistrate who tried the case should have issued summonses to the witnesses the petitioners desired to call in their defence, and (4) that the petitioners are not guilty of offences under sections 53 and 61 and that the first petitioner Gostho Behari should have been convicted only of an offence under section 59 of the Act.

The first of these grounds clearly fails. The appeal was heard by Mr. Foster. The prosecution was ordered on the report of the Excise Sub-Inspector by Mr. Liddell. The second plea must prevail. The accused Fakira was only a servant of Gostho Behari. It was Gostho Behari who sold the *ganja*, received the money for it and ordered Fakira to deliver the *ganja* to the purchaser. Similarly it was Gostho Behari, who was found in possession of the *ganja*. Fakira was in his employer's house at the time, but cannot be regarded as having been in possession of the *ganja*. The conviction and sentences of the petitioner, Fakira, must, therefore, be set aside.

The third plea is of no force. The accused were bound to bring their own witnesses, the case being a summons case. Further, this plea has no substance. The facts are not disputed. We have not been told how the petitioners have been prejudiced or what evidence they wished to adduce was excluded.

The last ground is that the petitioner Gostho Behari, being a licensed vendor of exciseable articles, sections 53 and 61 of the Act have no application to him. These sections, it is said, apply only to persons other than licensed vendors. Gostho Behari was under his license bound to sell *ganja* only at his shop in Sarandi and not at Bolepur, where he sold it. He had a perfect right to be in possession of the quantity of the *ganja* found in his shop at Bolepur, and though in selling it there he

contravened clause 5 of his license, he broke no condition of his license by being in possession of it there. We consider this contention must prevail. Gostho Behari had no right to sell *ganja* at Bolepore but he was a licensed vendor and, therefore, did no more than contravene a condition of his license, for which he is liable to a fine of Rs. 50 under section 59 of the Excise Act (See *Empress v. Nobocomar Pal* (1). In being in possession of 130 tolahs of *ganja* at Sarandi, he broke no condition of his license and, being a licensed vendor, has not committed an offence under section 61.

We accordingly set aside the conviction and sentences passed on the petitioners under sections 53 and 61 of the Excise Act. The fines imposed on Fakira, if paid, will be returned to him. We convict the petitioner Gostho Behari Saha of an offence under section 59, Act VII of 1878 B.C., and direct that he do pay a fine of Rs 50 or do undergo 15 days' simple imprisonment in default. If the fines imposed on Gostho Behari have been already paid, the balance of the fines after deducting the fine of Rs. 50 now imposed on him, will be returned to him.

N. K. B.

Rule made absolute in part; conviction varied.

(1) (1881) I. L. R. 6 Calc. 621.

CIVIL RULE.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

SONAULLA SARKAR

v.

BEAKUL MANDAL.*

*Civil Procedure Code (Act XIV of 1882), Secs. 108, 562—Rehearing—
Remand of case—Trial on merits.*

In an application under Sec. 108 of the Civil Procedure Code on the grounds of fraud and suppression of summons, the Munsiff rejected the application holding there was no fraud and no suppression. On appeal the District Judge passed the following judgment :

"This was an application under Sec. 108, Civil Procedure Code. After hearing arguments of pleaders, I am of opinion that this is a fit case for remand. Ordered accordingly that the appeal be allowed and the suit be remanded to the lower Court for trial on its merits."

Held, this was not a proper judgment. The case having been in fact tried on the merits, the District Judge had no jurisdiction to remand it but should have come to a conclusion on the evidence.

* Civil Rule No 3488 of 1907 against a decision of S. N. Huda Esq., District Judge of Pabna dated the 26th September 1907 reversing that of Babu Joti Prasad Chatterji, Munsiff of Serujgange dated the 11th May 1907.

CRIMINAL.

1907.

Gostho Behari Saha
v.

King Emperor.

Rampini, J.

CIVIL.

1908.

January, 13.

CIVIL.

1908.

Sonaulla Sarkar

v.
Beakul Mandal.

Rule obtained by the Plaintiff.

Application for rehearing of a case.

The material facts and arguments appear from the judgment.

Babu Narendra Kumar Basu for the Petitioner.

The judgment of the Court was delivered by

Mitra J.—This is a Rule calling on the opposite party to show cause why the order of the District Judge of Pabna and Bogra dated the 26th September 1906 should not be set aside on the ground that the judgment is not in accordance with law and cannot be accepted as such or why such other order should not be made as to this Court may seem fit and proper.

The order of the lower appellate Court was made in a proceeding under section 108, Code of Civil Procedure. The Munsiff disallowed an application under section 108 of the Code made by the defendant asking that the case might be re-heard on the ground that summons had not been served on him. The conclusion arrived at by the Munsiff was that there was no fraud and no suppression of summons. On appeal by the defendant, the lower appellate Court remanded the case. The judgment of the lower appellate Court is in these words :—"This was an application under section 108, Code of Civil Procedure. After hearing arguments of pleaders, I am of opinion that this is a fit case for remand. Ordered accordingly, that the appeal be allowed and the suit be remanded to the lower Court for trial on its merits." As a matter of fact, the case was tried on its merits by the Munsiff. It was not decided on a preliminary point. The learned District Judge gave no reasons for setting aside the judgment of the Munsiff. He simply said that this was a fit case for remand. We have gone through the papers and we see no reason why the lower appellate Court should not come to a conclusion on the evidence. We accordingly set aside the order of the learned District Judge and direct him to retry the case and give reasons for his findings one way or the other.

The Rule is accordingly made absolute with costs, one gold mohur.

N. K. B.

Rule made absolute.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

MOKHODA DEBI AND ANOTHER

v.

UMESH CHANDRA BANERJEE AND OTHERS.*

*Transfer of Property Act (IV of 1882), Sec. 43—Estoppel—Representation
—Transferor—Subsequent acquisition of rights.*

CIVIL.

1907.

November, 12.

The rule of law underlying Sec. 43 of the Transfer of Property Act is that, as between the transferor and the transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. The principle is an extension of the rule of estoppel.

Where a person who had merely a *ghatwali* interest in certain land, mortgaged it on the representation that it was his *jaigir* and he subsequently got a *mokarari* title to it :

Held, that on a decree for sale upon the mortgage, the *mokarari* interest of the mortgagor passed to the mortgagee.

Appeal by the Defendants.

Suit for possession of land.

The material facts and arguments appear from the judgment.

Mr. B. C. Seal for the Appellants.

Babus Mohendra Nath Roy and Lalit Mohan Banerjee for the Respondents.

The judgment of the Court was delivered by

Mitra J.—The land covered by this litigation is a portion of *ghatwali* land which was in the possession of defendant No. 4 as a Ghatwal. In 1898, he mortgaged the land to the defendants Nos. 2 and 3 alleging that it was *jaigir* land. The instrument of mortgage shows nothing which would indicate that the mortgagor had no alienable interest in the land. On the other hand, we must presume from the nature of the transaction that there was an implied representation by the mortgagor to the mortgagees that the property covered by the mortgage was alienable. It was not described in the deed as *ghatwali*. If it were, we would have held that the mortgagees obtained the mortgage with their eyes open. The learned Subordinate Judge who has dealt with the case in appeal committed an error in thinking that the property was described in the mortgage as *ghatwali*. As a matter of fact, it was described, as we have said, as *jaigir*, which may or may not be alienable.

November, 12,

* Appeal from Appellate Decree No. 307 of 1906 against a decision of Babu Durga Charan Sen, Subordinate Judge, Bankura, dated 18th November 1905 reversing that of Babu Upendra Chandra Mookerji, Munsiff of Vishnupur, dated 12th November 1904.

CIVIL.

1907.

Mokhoda Debi
v.
Umesh Chandra
Banerjee.

Mitra, J.

The mortgagees instituted their suit on the mortgage and obtained a preliminary decree on the 17th August 1901 and a final decree for sale on the 15th March 1902. In the meantime, the mortgagor entered into a contract of sale with the plaintiffs; but no sale took place until the 30th April 1902. The contract of sale had not the effect of conveying the property. It was the sale of the 30th of April 1902 which transferred the property to the plaintiffs.

At the time of the mortgage, the mortgagor had no other right than that of a *ghatwali* tenure-holder; but, on the 30th September 1901, the mortgagor obtained a *mokarari* right from the Burdwan Raj, the land having been resumed in the meantime and settled with the Raj. The right of the mortgagor to the property, as it now exists, dated, therefore, from the 30th September 1901. When, however, the plaintiffs obtained their *kobala* from the mortgagor, the defendant No. 4, the property had practically passed to the mortgagee defendants, the appellants before us, as the final decree for sale had been made before the sale to the plaintiffs. The mortgagee defendants purchased the property on the 22nd May 1902 and succeeded in obtaining possession.

The defendant No. 1 was a tenant on the land and he pleaded the right of the mortgagee defendants in a suit which was instituted for rent against him by the plaintiffs. The plaintiffs have now brought this action for possession of the land covered by the mortgage and purchased by the mortgagee defendants.

The first Court came to the conclusion that the mortgagee defendants had right to possess the land by virtue of the mortgage, the mortgage-decree and the sale thereunder. The lower appellate Court, while holding that the mortgage was good and that the decree and the sale were neither fraudulent nor collusive, came to the conclusion that the plaintiffs were entitled to the relief claimed on two grounds:—first, that it was not made out that the land covered by the plaint was identical with the land purchased by the mortgagee defendants and, second, that under section 43 of the Transfer of Property Act, these defendants had not the right to resist the plaintiffs.

As regards the question of identity, the point was not distinctly raised in the pleadings. All that paragraph 5 of the plaint referred to by the Subordinate Judge says is "that the defendant No. 2 did not purchase the land at auction." It is not clear whether the plaintiffs intended to say that the land was not identical

or that the defendants had not at all purchased the property. But it is clear from the proceedings in the suit and the issues raised that no question was raised as regards identity. The judgment of the Subordinate Judge on this point cannot, therefore, be sustained.

As regards the right of the plaintiffs to the land in dispute, it is clear, irrespective of section 43 of the Transfer of Property Act, that the mortgagee defendants had the right, they having obtained a final decree for sale before the purchase by the plaintiffs. That right cannot, in our opinion, be defeated by the application of the rule laid down by section 43 of the Transfer of Property Act. It was a legal right created by a decree which cannot be disturbed and the mere fact that the plaintiffs have purchased subsequently would not, unless the mortgage and the decree were fraudulent, defeat the right of the mortgagee defendants.

As regards the application of section 43 itself, there was clearly such representation made to the mortgagees as would entitle them, on the mortgagor obtaining right to the property, to fall back on that section. The rule of law which underlies section 43 of the Transfer of Property Act is that, as between the transferor and the transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. The principle is an extension of the well-known rule of estoppel. True, there is no evidence of actual representation ; but, having regard to the nature of the deed and the words used in it, we have no doubt that there was such representation as would bring the case within the rule of estoppel indicated in section 43 of the Act.

We are, therefore, of opinion that, on both the grounds urged before us, this appeal ought to succeed, and we accordingly direct that the decree of the lower Appellate Court be set aside and that of the first Court be restored with costs in all Courts.

N. K. B.

Appeal decreed.

CIVIL.

1907.

Mokhoda Debi

v.

Umesh Chandra
Banerjee.

Mitra, J.

CIVIL.

1907.

August, 5.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

TANTARDHARI SING AND OTHERS

v.

SUNDAR LAL MISSIR AND OTHERS.*

Sale-certificate, if necessary to be filed in suit for establishment of title by auction-purchaser—Decree against landlord, if admissible in evidence against tenant.

A purchaser of immovable property at an execution sale can establish his title by evidence independently of the sale certificate; a sale-certificate is not the title, but merely the title-deed.

Narayan v. Shamrao (1) and *Jagan Nath v. Baldeo* (2) followed.

A decree obtained by a person claiming to have a proprietary right to certain lands against other persons who set up similar proprietary right to the same lands, is admissible in evidence against the tenants of the latter who were not parties to the suit in which that decree was obtained and who do not claim independently of their landlords.

Tepu Khan v. Rajani Mohun (3) referred to.

Appeal by the Plaintiffs.

Suits for declaration of title and for recovery of possession.

The facts of the case appear sufficiently from the judgment.

Babu Digumbar Chatterjee for the Appellants.

Babu Joy Gopal Ghosha for the Respondents.

The judgment of the Court was as follows:

Mookerjee J.—This is an appeal on behalf of the plaintiffs in an action for declaration of title to a parcel of land and for recovery of possession thereof. Their claim was resisted by two sets of defendants. The first set of defendants who are the representatives of one Mohadeo Misser set up a proprietary title to the land. The second set of defendants set up a tenancy right under the first party defendants.

The allegations of the plaintiffs were that the disputed lands were sold in execution of a decree against Mohadeo and purchased by them, that they were unable to obtain possession, that they brought a suit against Mohadeo and obtained an *ex parte* decree, and that in execution of this decree they were placed in possession on the 31st March 1900. The plaintiffs further alleged that after they had obtained possession they were dispossessed by all the tenants acting in collusion with the first party defendants.

* Appeal from Appellate Decree Nos. 2484 and 2645 of 1905, against the decrees of Babu Bepin Behary Sen, Subordinate Judge of Mozuffarpur, dated the 14th September 1905, modifying those of Moulvi Khalilur Rahman, Munsif of Madhubani, dated the 6th March 1905.

(1) (1903) I. L. R. 27 Bom. 379.

(2) (1883) I. L. R. 5 All. 305.

(3) (1898) I. L. R. 25 Calc. 522.

The Court of first instance found the question of title in favour of the plaintiffs and gave them a decree. Upon appeal the learned Subordinate Judge has modified that decision on two grounds. He has held *first*, that as the plaintiffs have not produced their sale certificate, they are not entitled to establish their title by any other evidence ; and *secondly* that the decree which was obtained by the plaintiffs against the first party defendants is not admissible in evidence against the tenants, who were not parties to the litigation in which that decree was obtained.

The plaintiffs have now appealed to this Court and on their behalf it has been argued that the judgment of the Subordinate Judge is founded on an erroneous view of the law upon each of these two points. In our opinion this contention is well-founded.

It is settled law that, when a person has purchased immoveable property at an execution sale, he can establish his title by evidence independent of the sale certificate, because as Mr. Justice Chandavarkar puts it in the case of *Narayan Bhagwan Gandhi v. Shamrao Laxuman*(1), a sale certificate is not the title, but merely the title deed. The same view has been taken by the Allahabad High Court in the case of *Jagan Nath v. Baldeo* (2). In that case it was ruled by a Full Bench that it was not incumbent on a purchaser at an execution sale which had been duly confirmed to produce the certificate of sale in order to entitle him to recover possession of the property. It is competent for him to prove this purchase *aliundi*. The confirmation of the sale in his favour is *prima facie* evidence of his title to the property and is sufficient to pass such title to him, of which a sale certificate, if afterwards obtained by him, is merely evidence that the property has so passed. To the same effect are the decisions of this Court in the cases of *Doorga Narain Sen v. Baney Madhub Mozoomdar* (3) and *Tara Prasad Mytee v. Nund Kishore Giri* (4) ; and the same view has been affirmed by the learned Judges of the Madras High Court in *Velan v. Kumarasami* (5). We agree in this view of the law, and hold that the Subordinate Judge ought not to have decided against the plaintiffs upon the question of title merely because they had failed to produce their sale certificate.

The next question which arises is as to the effect of the decree obtained by the plaintiffs against the first party defendants. In respect of the land covered by that decree, it is obvious that it

CIVIL.

1907.

Tantardhari Sing
v.
Sundar Lal Missir.
Mookerjee, J.

(1) (1903) I. L. R. 27 Bom. 379.

(3) (1881) I. L. R. 7 Calc. 199.

(2) (1883) I. L. R. 5 All. 305.

(4) (1883) I. L. R. 9 Calc. 842.

(5) (1887) I. L. R. 11 Mad. 296.

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operates as *res judicata* between the plaintiffs on the one hand and the defendants, representatives of Mohadeo, on the other. So far as the tenant defendants are concerned, the decree is also admissible in evidence as against them. It was held by a Full Bench of this Court in the case of *Tepu Khan v. Rajani Mohun Das* (1), that under certain circumstances in certain cases the judgment in a previous suit to which one of the parties in the subsequent suit is not a party, may be admissible in evidence for certain purposes and with certain objects in a subsequent suit. Reference may be made to the judgment of Mr. Justice Geidt in *Abinash Chandra v. Paresh Nath* (2), where the grounds and limits of this rule are explained. In cases of the description now before us the decree between the landlords is undoubtedly admissible against the tenants; it is a decree obtained by persons who claim to have proprietary right to certain lands against other persons, who set up similar proprietary right to the same lands; as between these rival claimants, the decree sets at rest the question of title. The tenants defendants do not claim independently of the first party defendants against whom the plaintiffs have obtained the decree. If the decree therefore is admissible in evidence and operates as *res judicata* so far as the first party defendants are concerned, it is clear that the decree is at least admissible in evidence against the tenant defendants. Upon the second point, consequently, we must hold that the judgment of the Subordinate Judge is erroneous.

The result, therefore, is that this appeal is allowed, the decree of the Subordinate Judge, in so far as it is against the plaintiffs, is set aside, and the case is remanded to him in order that the appeal may be reheard.

We may observe that in respect of some of the lands, in dispute, the Subordinate Judge has found that the tenant defendants have established their right. Our observations, on the judgment of the Subordinate Judge do not affect this finding; but this finding cannot be taken to apply to lands to which the Subordinate Judge found that the plaintiffs had not established their title. When, therefore, after the remand the Subordinate Judge deals with the question of the title of the plaintiffs, if he finds in favour of the plaintiffs, he will consider whether the second party defendants have established the tenancy right alleged by them in these lands.

The costs of this appeal will abide the result.

(1) (1898) I. L. R. 25 Cal. 522.

(2) (1904) 9 C. W. N. 402.

It is conceded that this judgment will govern Appeal No. 2645 of 1905 with this difference that in that case the first party defendant is not the representative of Mohadeo but of Maksudun.

A. T. M.

Appeal allowed.

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*Mookerjee, J.**Before Mr. Justice Mookerjee and Mr. Justice Caspersz.*

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August, 8, 9, 16.

Revenue Sale Law (Act XI of 1859), Secs. 27, 54—Title of purchaser, when vests—Title, when complete—Sale certificate, evidence of title—Purchaser takes subject to encumbrance—Power of proprietor to deal after default—Mortgage of non-existent property.

Under section 27 of the Revenue Sale Law the title automatically vests in the purchaser at the revenue sale by reason of the sale and payment of purchase money. It becomes complete as soon as the sale became final and conclusive even though possession is not obtained. The certificate of sale does not create title, it is merely evidence of title.

Tantardhari Singh v. Sundar Lal Missir (1) applied.

The purchaser of a share of an estate under section 54 of the Revenue Sale Law takes the share subject to encumbrances which were in existence on the date to which the title relates back (that is, the day after that fixed for the last day of payment) and were in force on the date of sale.

The power of the proprietor to deal with his property is not lost by reason of the default in payment of revenue; if no sale was held by the Collector on the basis of such default, a mortgage created by the owner after default is not inoperative.

Shyam Kumari v. Rameswar Singh (2) referred to.

A mortgage of non-existent property, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property, the moment it is acquired and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage.†

Appeal by the second Defendant.

Suit to enforce mortgage bond.

The facts and arguments appear sufficiently from the judgment of the Court.

Babu Dwarka Nath Mitter for the Appellant.

Babu Jogesh Chandra Roy for the Respondents.

C. A. V.

* Appeal from Appellate Decree No. 2511 of 1905, from the decision of Babu Bajendra Nath Dutt, Subordinate Judge of Saran, dated the 6th September 1905, reversing that of Babu Ambica Charan Mozumdar, Munsiff of Chapra, dated the 22nd July 1904.

(1) (1907) 7 C. L. J. 384.

(2) (1904) I. L. R. 32 Calc. 27 at 38.

[† See *Baldeo Parshad Sahu v. A. B. Miller*, (1904) 1 L.R. 81 Calc. 667—Rep.]

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The judgment of the Court was delivered by

Mookerjee J.—The subject matter of the litigation, which has given rise to the present appeal, is a ten annas eight pie share, known as the residuary share, of estate Chak Ramdas which bears Towji No. 3144 on the Revenue Roll of the Collector of Sarun at Chapra. The plaintiff, respondent, seeks to enforce against this property a mortgage, executed by defendant No. 1, while the second defendant, appellant, claims to hold the property free of this encumbrance, as a purchaser at a sale for arrears of Government revenue.

The disputed property originally belonged to one Dasarath Lal who made default in payment of Government revenue on the 12th January, 1902. The share of the estate was consequently sold by the Collector on the 26th March, 1902, and was purchased by the first defendant. Default was made in payment of the next instalment of revenue, which fell due two days later on the 28th March following. On the 23rd April, 1902, the first defendant executed in favour of the plaintiff, the mortgage now in controversy. It is not disputed that the loan was taken to pay the balance of the purchase money due to the Collector, and the sum advanced was actually applied for that purpose on the 24th April 1902. The mortgage bond was duly registered on the 15th May. Meanwhile, the Collector did not take any steps to bring the property to sale, although default had been made on the 28th March. On the 8th June, however, fresh default was made in payment of the instalment of revenue due on that date. On the 22nd September, 1902, the share of the estate was sold by the Collector, and was purchased by the second defendant who is the appellant before this Court. Later on, he was granted a sale certificate in the form prescribed in the Schedule A to Act XI of 1859, in which it was stated that his purchase took effect on the 9th June, 1902, that is, on the day after that, fixed for the last day of payment of that *kist*.

Upon these facts, the Court of first instance held, that the mortgage was not enforceable against the share of the estate in the hands of the second defendant. Upon appeal, that decision was reversed by the Subordinate Judge, who held that there was a valid mortgage subject to which the property passed into the hands of the appellant. In this view of the matter he gave the plaintiff the usual mortgage decree.

The second defendant has now appealed to this Court, and on his behalf the judgment of the Subordinate Judge has been

challenged, substantially, on three grounds, namely, *first*, that as the sale-certificate of the mortgagor (defendant No. 1) of the plaintiff has not been produced, and as there is nothing to show that such a certificate was at any time granted to him, the first defendant never acquired a good and complete title, and could not create a valid mortgage; *secondly*, that as the mortgage was created after default had been made in payment of the Government revenue, on the 28th March, 1902, the mortgage was not operative as against the purchaser at the revenue sale, and, *thirdly*, that as the mortgage was created at a time, when the purchase by the first defendant at the revenue sale had not become final and conclusive, the mortgage never became operative in law.

In support of his first contention, it was argued by the learned vakil for the appellant, that the certificate of sale granted by the Collector to a purchaser at a revenue sale is the basis of his title, and that the title can be proved only by the production of the certificate. In our opinion, there is no foundation for this contention. The title automatically vests in the purchaser by reason of the sale and the payment of the purchase money as provided by the Statute. This is obvious from sections 27 of the Revenue Sale Law which provides that, upon payment of the purchase money, and upon expiry of the prescribed period, the sale becomes by operation of law final and conclusive. The certificate of sale, which it is the duty of the Collector to grant to the purchaser does not create title; it is merely evidence of title. The purchaser who has obtained the certificate, becomes entitled to delivery of possession of the estate, and he has the further advantage that, under section 8 of Act VII of 1868, B.C., the certificate is conclusive evidence of regularity in the service of certain notices. But no authority has been shewn in support of the proposition that the title is created by the certificate, nor has any intelligible principle been suggested upon which such a view could be maintained. The contention that the certificate is the only evidence by means of which the title can be proved is equally groundless, and is opposed to the decision of this Court in the case of *Tantardhari Singh v. Sundar Lal Misser* (1), in which it was ruled, that where a sale has been held in execution proceeding under the Civil Procedure Code, the title of the auction purchaser may be proved independently of the sale-certificate, which is not the title, but merely the title deed.

(1) (1907) 7. C. L. J. 384.

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The same principle is applicable to the case of a revenue sale ; in fact, here the position is much stronger, because under section 314 of the Code of Civil Procedure an order for confirmation of the sale has to be made by the Court, whereas under the Revenue Sale Act, the sale becomes final and conclusive by operation of law. We must consequently hold, that the mere fact that a sale-certificate was not taken out by the first defendant, or, if taken out, was not produced in these proceedings, does not affect his title or invalidate the mortgage created by him. We find, moreover, from the second paragraph of the written statement of the second defendant, that he admits that the first defendant purchased at the sale for arrears of revenue, held in March 1902, and made default in payment of the June instalment of the revenue. This is equivalent to an admission that the first defendant became the proprietor by his purchase and incurred the liability to pay revenue under section 30 of Act XI of 1859. There can be no possible controversy, therefore, that the title of the plaintiff is in no way defective by reason of the omission of the mortgagor to take out a sale certificate and to produce it in the present litigation. The first point taken on behalf of the appellant consequently fails.

The second ground urged raises the question, whether the mortgage in favour of the plaintiff was vitiated by reason of the previous default made in payment of Government revenue on the 28th March 1902. The learned vakil for the appellant has invited us to answer this question in the affirmative on the authority of the decision of this Court in *Chowdhry Jogessur v. Khetter Mohun* (1) and *Umatara v. Uma Charan* (2). It was ruled in these cases, that when a share of an estate is sold for arrears of revenue, a mortgage on such share, executed between the date of default and the date of sale, is invalid as against the purchaser, and the mortgagee is entitled only to a charge on the surplus sale-proceeds after payment of the arrears of revenue. In our opinion, neither this rule nor the principle upon which it is based, has any application to the circumstances of the present case. In the cases cited, the mortgage was created after the date to which the title of the purchaser related back under Schedule A of Act XI of 1859 ; the principle on which these decisions were founded, is that the purchaser under section 54 takes the property in the condition in which it was on the date after default, with effect from which date he becomes proprietor.

(1) (1889) I. L. R. 17 Calc. 148.

(2) (1904) 3 C. L. J. 52.

This is clear from the case of *Bhawani Koer v. Mathura Pershad* (1) in which the earlier authorities were reviewed and the principle on which they are based, examined, and the true rule was held to be, that the purchaser of a share of an estate under section 54 of Act XI of 1859, takes the share, subject to encumbrances which were in existence on the date to which the title relates back (that is, the day after that fixed for the last day of payment) and were also in force on the date of sale. If this test be applied to the present case, the contention of the appellant proves to be wholly unfounded. No doubt, there was a default on the 28th March 1902, but the sale in September was not held by reason of that default, and the title of the purchaser did not relate back to that date. The Collector, apparently, condoned the intermediate default, and if the next default had not been made, that is, if whatever was due on the 8th June 1902, had been paid, the sale might never have taken place. It cannot be contended that, merely because there was a default on the 28th March 1902, the power of the proprietor to deal with his property was extinguished, and that, although no sale was held by the Collector on the basis of such default, a mortgage created by the owner was inoperative. As observed by their Lordships of the Judicial Committee in *Shyam Kumari v. Rameswar Singh* (2), "liability to sale is not the same thing as sale, and until a revenue sale takes place, the ownership of the estate remains as it has been, except so far as the provisions of the Act interfere with it; it is always open to the Collector under section 18 to exempt the estate from sale, if the arrears are paid up before sale; and it is a matter of common knowledge, that this is a power which Collectors exercise freely; to regard an estate, in respect of which default has occurred and which is, therefore, liable to sale, as a lost estate would be quite contrary to the facts as they exist."

In the case before us, there was no occasion for the Collector to exercise his powers under section 18 of Act XI of 1859; he took no action whatever on the basis of the default made on the 28th March 1902. There is no force, therefore, in the contention of the appellant that the power of the proprietor to deal with the estate was lost by reason of the default in payment of revenue, which circumstance, in our opinion, does not by itself invalidate the mortgage as against the appellant whose title took effect from a much later date. The second ground on which the

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(1) (1907) 7 C. L. J. 1 (25.)

(2) (1904) I. L. R. 32 Calc. 27 at 38.

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judgment of the Subordinate Judge is challenged, cannot consequently be maintained.

The third point taken on behalf of the appellant attacks the mortgage of the plaintiff on the ground that it was inoperative in its inception, inasmuch as, on the date on which it was created, the mortgagor had not acquired any title to the property which he professed to transfer. It was argued by the learned vakil for the appellant, that on the 23rd April, 1902, the title of the first defendant had not been completed, as he had paid nothing more than the preliminary deposit required by section 22 of Act XI of 1859; if he had failed to pay the balance, the sale might never have taken effect and even if the balance of the purchase money were duly paid, the sale might have been annulled upon an appeal preferred to the Commissioner. On these grounds, it was contended that the first defendant, when he gave the property as security, had no title thereto and no authority to deal with it.

In our opinion, even if all these hypotheses be conceded in favour of the appellant, it does not by any means follow, that the mortgage is inoperative. As we have already explained, after the whole of the purchase-money had been duly paid under section 23, the purchase of the first defendant became, by virtue of section 27, final and conclusive on the 24th May, 1902; there can be no possible controversy that on this date the first defendant became proprietor of the share sold with effect from the 13th January, 1902. The result is, that as soon as the title of the mortgagor became complete, the mortgage previously executed, fastened upon that interest and from that moment, came into full force and operation.

The doctrine applicable to cases of this description is explained in the leading case of *Holroyd v. Marshall* (1), which arose upon a mortgage of certain machinery and implements described in a schedule to the deed, and all other machinery and implements which should, during the continuance of the security, be fixed or placed on the premises, in addition to, or in substitution for, that specified in the schedule. Upon a Bill in Equity by the mortgagee against a judgment creditor of the mortgagor who had levied an execution upon the after-acquired property, the question arose, who had the better title. Lord Westbury L. C. held that the mortgagee had the preferential title on the ground, that if a vendor or mortgagor agrees to

(1) (1862) 10 H. L. C. 191.

sell or mortgage property, real or personal, of which he is not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract; there is no doubt that a Court of Equity would compel him to perform the contract, and that the contract would in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. The same doctrine was applied by Sir George Jessel M. R. in *Collyer v. Isaacs* (1), where that eminent Judge observed that a mortgage of non-existent property constitutes only a contract to transfer the after-acquired property, and when the property comes into existence in the future, equity fastens upon that property, with the result that the contract to assign ripens into a complete assignment [see also *Tailby v. Official Receiver* (2).]

The foundation of the doctrine, therefore, is that a mortgage of non-existent property, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property the moment it is acquired, and in equity, transfers the beneficial interest to the mortgagee, without any new act done by the mortgagor to confirm the mortgage. This principle has been traced to two different sources. In some cases, reliance is placed on the maxim that equity considers that done, which ought to be done. [*Williams v. Briggs*, (3)]. In other cases, the aid is invoked of the doctrine of estoppel, and it is said, that as soon as the property comes into existence, the mortgage operates by way of estoppel, the principle of which is explained in section 43 of the Transfer of Property Act [*Scott v. Clinton* (4).] See also *Webb v. Austin* (5), *Sturgeon v. Wingfield* (6), and *Church v. Dalton* (7).] which show that where an estate by estoppel becomes an estate in interest by the grantor's subsequent acquisition of an estate, the parties and their assignees are in the same position as if the estate had been *ab initio* an estate in interest. The doctrine was elaborately examined by Mr. Justice Story in *Mitchell v. Winslow* (8), and the same rule was subsequently adopted by the Supreme Court of the United States in *Dankam v. Cincinnati* (9), *Galveston v. Cowdrey* (10) and *Pennock v. Coe* (11).

(1) (1811) 19 Ch. D. 312.

(2) (1883) 13 A. C. 523.

(3) (1877) 11 Rhode Island 476; 23 Am. Rep. 518

(4) (1876) 6 Bissell 529; 21 Fed. Cas. 820.

(5) (1814) 8 Scott N. R. 419.

(8) (1843) 2 Story 630; 17 Fed. Cas. 527.

(6) (1846) 15 M. and W. 224.

(9) (1863) 1 Wallace 254.

(7) (1852) 2 Ir. C. L. R. 219.

(10) (1870) 11 Wallace 459.

(11) (1869) 23 Howard 117.

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We think there can be no possible question, that the rule is founded on broad principles of justice, equity and good conscience, and does not rest upon any peculiar doctrines of English or American Jurisprudence. [Jones on Mortgage, 1904, sections 152, 153 and Jones on Chattel Mortgages, 1894, sections 170—175.] The principle was recognized in this country so far back as 1850 by the Supreme Court of Calcutta in *Mackinlay v. Dunlop* (1), and was applied by the learned Judges of the Allahabad High Court in *Bansidhar v. Sant Lal* (2) and *Gaya Din v. Kashi Gir* (3).

It was contended, however, by the learned vakil for the appellant, that this principle ought not to be applied to the present case, as here the mortgagor never obtained possession. In our opinion, this circumstance makes no difference. The title of the mortgagor became complete as soon as the sale became final and conclusive, even though possession was not obtained, [*Kali Das v. Kanhya* (4), *Mahomed Buksh v. Hosseini* (5) and *Narayan v. Laxuman* (6)] moreover, the mortgage did not transfer possession of the share, nor did it purport to do so.

What then is the position of the parties? The mortgage in its inception may be treated as a mortgage in respect of property over which the mortgagor at the time had not acquired a complete title; on the 24th May, 1902, however, his title became complete and by operation of law related back to a period antecedent to the mortgage. On that date, therefore, as between the mortgagor and the mortgagee, there was a valid and operative incumbrance on the share of the estate. The title of the appellant relates back only to the 9th June, 1902, and, under section 54 of Act XI of 1859, he has not acquired any right which was not possessed by the previous owner. The mortgage is, therefore, enforceable against the property in his hands. The third ground taken on behalf of the appellant cannot be supported.

The result is, that all the contentions urged for the appellant must be over-ruled and this appeal dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1850) 1 Taylor and Bell 498

(2) (1887) 1 L. R. 10 All. 133.

(3) (1906) 1 L. R. 29 All. 163.

(4) (1884) L. R. 11 I. A. 219; 1 L. R. 11 Calc. 121.

(5) (1888) L. R. 15 I. A. 81; 1 L. R. 15 Calc. 684.

(6) (1904) 1 L. R. 29 Bom. 42.

PRIVY COUNCIL.

PRESENT : *Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble,
and Sir Arthur Wilson.*

CHHATTRAPAT SINGH DUGAR

v.

MAHARAJ BAHADUR SINGH AND ANOTHER.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.]

*Land Registration Act (VII of 1876, B. C.)—Action of revenue authorities
under it—Competency of Civil Court to direct such action.*

Where the suit was really to obtain an order from a Civil Court which would bring about a re-consideration of the order passed by the revenue authorities under the Land Registration Act (VII of 1876, B. C.) in regard to the registration of the name of the plaintiff, as co-trustee, with that of another, the High Court dismissed the suit, holding that Civil Court was not competent to direct the action of the revenue authorities under that Act :

Held, that the view taken by the High Court as to the scope of the suit and its non-maintainability, was well founded.

Appeal from a decree of the High Court of Judicature at Fort William in Bengal (Prinsep and Harington JJ., February 1st, 1904) reversing a decree of the Court of the Subordinate Judge of Dinajpur (December 22nd, 1899) and dismissing the appellant's suit.

On December 17th, 1866, a lady called Mahatap Kumari Bibi, the paternal grandmother of the appellant and the first respondent, executed a will ; after making various devises and bequests of other portions of her property, she devised the property in suit "an 8 annas share of lot Sankarpur Mehal No. 76 on the rent roll of the Collectorate" to trustees in trust to "spend the amount of profit thereof annually at Sidhyachalji, and for the purpose of entertaining our castemen, for repair of temples &c., and for other good acts." By that will she appointed her two sons, Rai Luchmipat Singh Bahadur and Rai Dhanpat Singh Bahadur, the fathers of the appellant and of the first respondent respectively, trustees, along with 5 others. Mahatap Kumari Bibi died in August 1874.

In the Collector's Registers, on the death of Mahatap Kumari Bibi, the names of both her sons, Lachmipat and Dhanpat Singh, were entered in her place in regard to the said property with the following remark :—"These two persons are interested

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(in the properties) as trustees in an 8 annas share under a will of their mother to perform religious acts."

On May 24th, 1886, Lachmipat Singh died. Thereafter his son Chhatrapat Singh Dugar, the appellant, applied to have his name entered in the Revenue Registers in place of his deceased father. That application was granted by the Deputy Collector but was rejected on appeal by the then Collector of Dinajpur.

On May 23rd, 1892, the appellant instituted a suit (No. 445 of 1892) against his uncle Dhanpat Singh in the Court of the Subordinate Judge of Murshidabad for an account for administration of their mother's property and for a declaration in regard to the rights of the parties under her will.

That suit ended in a compromise effected on March 24th, 1893, which provided *inter alia* as follows :—

2. "According to the will of the late Mahtap Kumari Bibi, the paternal grandmother of the plaintiff, and mother of the defendant, an 8 annas share of lot No, 76 Sankarpur has been dedicated to religious purposes ; and in respect of the same the names of both of us *i.e.*, of the plaintiff and defendant shall be and shall continue to remain registered as trustees. The said property shall remain in the possession of the defendant ; and the defendant shall have the charge of collecting rents for the same, institute suits, and do everything in respect thereof ; and I, the plaintiff, Chhatrapat Singh, will get from the defendant the total amount Rs. 1,200 (twelve hundred) a year out of the profits thereof ; and with the same, I shall continue to defray the expenses on account of the temple of the God Bimalanathji, and of the temple of Dadaji, of the *sadobrata* (charitable establishment for entertainment of mendicants) at Baluchar and other purposes. After deduction of the said amount of Rs. 1,200, the remaining amount of profits shall be used by the defendant in defraying expenses for *Dharamsalas*, *Sadabratas*, &c., at Sidhy-achalji, Bhagulpur, Calcutta, Azimganj, &c. Besides the lot No. 76, Sankarpur, the name of the defendant shall remain registered as trustee in respect of other properties, and they shall remain under the supervision of the defendant.

3. "In the absence of the plaintiff, his heirs, and in the absence of the defendant, his heirs who will remain in commensality with him, will become trustees like them respectively. On getting the amounts of profits in the manner aforesaid, they and their heirs in succession shall continue to maintain the aforesaid religious acts regularly as aforesaid, in due order. If any of

the parties do not spend the money, that will have been obtained for the prescribed purposes, and appropriate the said money, he will become personally liable for the said money ; and the other party on performing the said acts will realize the same, and except that, none of the two parties shall be able to advance any claim for account against the other in future.

On March 24th, 1893 a decree was made in accordance with that compromise. In April 1896 the appellant filed a petition for registration of his name jointly with the name of Dhanpat Singh in the Registration Department of the Collectorate of Dinajpur under the provisions of the Land Registration Act, (VII of 1876, B. C.) but on June 26th, 1897, on objections taken by the first respondent, who had succeeded his father Dhanpat Singh, as his heir, that petition was rejected, the Deputy Collector holding that by the phrase "registration of name" in the above mentioned compromise meant some registration "other than the registration under Act VII of 1876." On appeal, the Collector confirmed that order on July 21st, 1897.

On July 1st, 1898, the appellant instituted a suit against the respondents in the Court of the Subordinate Judge of Dinajpur to recover from them the sum of Rs. 4,100 alleged to be due as arrears of the amount payable under the compromise and decree in suit No. 445 of 1892. A decree was made in favour of the appellant.

On July 7th, 1898, the appellant instituted the present suit in the Court of the Subordinate Judge of Dinajpur against the respondents representing the estate of Dhanpat Singh. The plaint after reciting the facts above mentioned alleged that the 5 persons appointed as trustees by Mahatap Kumari Bibi with her two sons having relinquished their office as executors and trustees, Dhanpat Singh was managing the affairs of the estate as a trustee ; that according to the will dated December 17th, 1866, and to the decision in the terms of the compromise in suit No. 445 of 1892, the appellant was entitled to, and in possession of the Mahal Sankarpur, as a trustee thereof jointly with Dhanpat Singh in his lifetime, and since his death, with his son the first respondent ; that it was improper for the Deputy Collector to reject the appellant's petition for registration of the name of the appellant, and to hold that by the words "registration of name" contained in the compromise, the registration of name under Act VII of 1876 was not understood ; and that thereby the appellant's right and interest in the said trust

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property had been affected. The appellant prayed for the following reliefs :

"That the Court may be pleased to pass a decree, declaring the plaintiff's right and possession in the 8 annas share of the said mahal, lot Sankarpur, as trustee thereof with the defendant after determining the same."

"The Court may be pleased to hold the permission given for registration of the name on the petition of the above mentioned solenama, made in the Court of the Subordinate Judge of Murshidabad and in the decree passed in terms thereof, as [permission for] the registration of name according to the Registration Act VII of 1876 of the Bengal Council, and to pass a decree declaring the same."

The respondents in their written statement pleaded *inter alia* that Lachmipat Singh, father of the appellant, had virtually renounced his trusteeship, and that the property in suit ever since then and for upwards of twelve years before the suit, had been in the sole possession of the father of the first respondent and of the respondents ; that the appellant never having had any possession of the mahal, could not have a declaration of his possession and title to the same, nor could he have a declaration as to the registration of his name under the Land Registration Act, as contended, with reference to the terms of the compromise ; that the respondents were not bound by the compromise ; and that the father of the appellant having renounced his trusteeship in his lifetime, the appellant could not be held to be a trustee in his place. Of the 12 issues framed it is necessary to mention here only the following :

"6th, With what object and intention was the word "*namjari*" used in the petition of compromise and decree in suit No. 445 of 1892, of the Subordinate Judge's Court at Murshidabad, and what is the meaning of that word in the same ?"

"7th, Whether the plaintiff has any right to have his (name) registered in the Dinajpur Collectorate as a trustee for the 8 annas share of lot Sankarpur bearing towzi No. 76 ?"

"8th, Whether the plaintiff is in possession of the property ? If not, can his name be registered ?"

"9th, To what relief, if any, will the plaintiff be entitled." On December 22, 1899 the Subordinate Judge delivered his judgment. He decided nearly all the issues in favour of the appellant, and made a decree in his favour in terms following : It is ordered that the suit be decreed with costs in the presence

of both the parties ; that the plaintiff's right to the disputed property as co-trustee jointly with the defendant be declared ; that the plaintiff has right to get from the defendant Rs. 1,200 annually from the profits of the said property, and that it be declared that the plaintiff should have possession only in that right, that it be further determined that the clause

"The plaintiff's name will be registered as a trustee in respect thereof and will continue to remain so" in the *solenama* means that the plaintiff's name will be registered in respect of the mahal in dispute under the provisions of Act VII of 1876 of the Bengal Council."

Against that decree the respondents appealed to the High Court of Judicature at Fort William in Bengal. The High Court (Prinsep and Harington JJ.) delivered its judgment on February 1st, 1904 and decided that the Civil Court was not competent to direct the action of the revenue authorities under the Land Registration Act ; and that the appellant was not in any way entitled to bring the present suit. In the result, the High Court set aside the decree of the Subordinate Judge and dismissed the appellant's suit with costs in both Courts. The High Court gave for its decision the following reasons, which were approved and adopted by their Lordships of the Privy Council in upholding the decree of the High Court :

"The present suit is really to obtain an order from this Court which would bring about a re-consideration of the order passed by the revenue authorities so as to obtain the registration of the name of Chhatrapat as a co-trustee with that of Dhanpat.

"We may first of all observe, and this is admitted by both the learned pleaders who have appeared in the present case, that even if we were inclined to hold in favour of the plaintiff, we are not competent to direct the action of the revenue authorities under the Land Registration Act. The prayer in the suit is also for a declaratory order in respect of the plaintiff's right of possession in this property as trustee together with the defendant.

"The Subordinate Judge decreed the plaintiff's suit. He declared the plaintiff's right in the disputed property as a trustee jointly with the defendant and also that the plaintiff had a right to get from the defendant Rs. 1,200 annually from the profits of Sankarpur, that the plaintiff should have possession of that property only as a co-trustee, and he further found for the purposes of the *solenama* that the plaintiff's claim should be registered in respect of the mahal in dispute under the Bengal Land Registra-

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tion Act. Now, in regard to the terms of the *solehama*, we have no doubt it was intended that the management of Sankarpur should continue entirely in the hands of Dhanpat, for it is provided that he should remain in possession and management of the property, and it also provided; apparently on an estimate of the probable assets, that Chhatrapat should receive payment of Rs. 1,200 annually. So far, therefore, there was no intention in either of the parties that there should be any interference with the rights Dhanpat had hitherto exercised during the life-time of Luchmipat and up to the time of the compromise. The terms of the deed in regard to the registration of the plaintiff's name as co-trustee have given rise to the dispute between the parties.

"It seems to us that what was really in contemplation was that the rights of co-trustee which were given by the will to Luchmipat, the plaintiff's father, and descended to him by inheritance in the same way as the defendant has inherited the rights of Dhanpat should be preserved by some recognition of the opposite-party so as not to interfere with any right of Chhatrapat's heirs, or of his own, should it be necessary at any time to assert the same. It is not for us to consider what the effect of the refusal of the revenue authorities to register Chhatrapat's name under the Land Registration Act would be, nor have we any authority, as has been already pointed out, to direct, if we were so inclined, that the revenue authorities should so register him on their records. It is sufficient for us to state in the present case that the deed contemplated that there should be no interference with any act of Dhanpat and, therefore of Dhanpat's heirs in the management of the property. We do not of course mean to say that this should restrain the plaintiff or any one else from taking any action in the case of malversation. But it clearly contemplated that there should be no interference with the legitimate exercise of duties as manager of Sankarpur. There was no necessity for the Subordinate Judge to declare the plaintiff's right to receive an annual allowance of Rs. 1,200 out of the property seeing as we are informed, that the plaintiff simultaneously with the present suit, has brought a suit also for the arrears of this allowance which accrued due for some years past and has obtained a decree.

"The result, therefore, is that, in our opinion, the plaintiff is not entitled in any way to bring the present suit for which no sufficient grounds exist. The decree of the lower Court will,

therefore, be set aside, and the suit dismissed with costs in both Courts."

The appellant, thereupon, preferred the present appeal to His Majesty in Council.

Mr. Ross for the Appellant :—The High Court mis-conceived the nature of the suit and failed to correctly interpret the terms of the compromise and the decree dated March 24th, 1893, founded thereon. That Court erred in holding that no sufficient grounds existed for the suit and that the appellant was not entitled to bring it. The appellant was entitled to the relief claimed in the plaint. The decree of the Subordinate Judge granting the appellant that relief was right. The High Court set aside that decree on insufficient grounds.

Mr. DeGruyther for the Respondents was not called upon.

The judgment of their Lordships was delivered by

Lord Macnaghten.—Their Lordships do not think it necessary to call upon the respondents. They concur in the reasons stated in the judgment of the High Court.

Their Lordships will humbly advise His Majesty that this appeal ought to be dismissed. The appellant will pay the costs of it.

Mr. G. C. Farr—Solicitor for the Appellents.

Messrs. T. L. Wilson & Co.—Solicitors for the Respondents.

J. M. P.

Appeal dismissed.

PRESENT : *Lord Robertson, Lord Collins, and Sir Arthur Wilson.*

PESTONJI JIVANJI AND OTHERS

v.

EDULJI CHINYOY AND OTHERS.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER,
HYDERABAD ASSIGNED DISTRICTS.]

Native State—East India Company—Cantonment Land—Rights of alienation and management and control of the same in the absence of any treaty.

The Brigadier of the Hyderabad Subsidiary force has no title to any portion of the territory of the Nizam and has no authority to make any alienation thereof in perpetuity. It is the State alone which can make a valid grant of the land and the Cantonment Authorities have power to regulate the use thereof only in so far as it may affect the convenient occupation of the Cantonment.

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Appeal from a decree of the Court of the Judicial Commissioner, Hyderabad Assigned Districts (December 12, 1901) reversing a decree of the Court of the Superintendent, Residency Bazars, Hyderabad (March 25, 1901).

The question involved in the appeal was the title to a plot of land on which stands a Parsi Tower of Silence, situated in the South-eastern corner of the Cantonment limits of Secunderabad. The two Courts below came to different conclusions.

Mr. Jardine, K. C. and Mr. DeGruyther for the Appellants, contended on the evidence that title in the land was in the founders, Vicaji and Pestonji, personally.

Mr. Ross for the Respondents, contended that the appellants failed to prove any grant, oral or documentary, by which they acquired an exclusive title to the land in question, or any portion of it and that the evidence on the record, taken as a whole, proved that the property belong to the Parsi community and not to the appellants exclusively.

Reference was made to section 90 of the Indian Evidence Act (1 of 1872).

February, 12.

The judgment of their Lordships was delivered by

Sir Arthur Wilson.—The controversy out of which this appeal arises lies between various members of the Parsi community, and relates to certain land situated in the Secunderabad Cantonment, on a portion of which stands a Parsi Tower of Silence.

In or about the year 1895, the respondents, purporting to act on behalf of the Parsi community, resolved to erect on the land in question a second Tower of Silence in addition to that already there. The appellants objected to this proceeding, claiming as descendants, and representatives in title, of the original founders.

Negotiations for a settlement having failed, the appellants filed the present suit. They alleged that the founders were in their life-time the owners of the land in question, and that the property had devolved upon themselves, and they proceeded to complain of the respondents' encroachment.

The respondents, who were defendants in the suit, asserted that the land had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of that community generally for all time, by the Cantonment Authority.

In the Courts in India the defendants further set up, that,

if the grant had been to the founders, the latter had subsequently dedicated the land to the purposes of the Parsi community generally. It was also contended that a title, good against the founders and their representatives, had been acquired by adverse possession. On both those points the Courts in India found against the defendants, and their Lordships have not been asked to review those findings. The sole question discussed on the argument of the appeal was that of the original title to the property.

The Judge who tried the case decided in favour of the plaintiffs now appellants, and granted an injunction. On appeal the Judicial Commissioner reversed that decision and dismissed the suit. Hence the present appeal.

The founders, already mentioned, were two brothers, Parsis Pestonji Meherji, and Viccaji Meherji, who in 1837 and afterwards carried on business as bankers at Hyderabad and in other places. It appears from the correspondence that, at about that time, they had made up their minds to make Hyderabad their home, and they determined at the same time to establish a Tower of Silence ; for which purpose it was necessary both to obtain the ground on which the Tower could be built, and to establish the necessary priests for carrying on the services and ceremonies required by the Parsi religion.

It is clear that with regard to the establishment of priests everything was done by the brothers Pestonji and Viccaji. They found the proper persons, and arranged with them to come and settle at the spot to be selected. They undertook the responsibility for their salaries, though the priests were to be at liberty to receive fees for the performance of ceremonials from other Parsis.

Pestonji and Viccaji also through their agent at Secunderabad, made all the necessary arrangements for obtaining the site required. It is not necessary to examine all the contemporary papers in evidence. The most important document relied upon by the plaintiffs is the following :

" Ijat Asar Balkishta Reddy, Mucaddum of the village of Bholuckpore, in the District of Hoosain Saugar, may you be well, year 1248 Sal i. e. Fasli. The reason of writing this is that the bankers Pestonji and Viccaji having applied and Government having sanctioned the grant to them of the hill which is near Gattula Naganna Kunta in the Devini Bhavi Kancha within the boundary of the said village, for depositing bones, the taluqdar

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Raja Rang Rao Bahadur has sent order and therefore it is hereby written that you deliver up the said hill to the said bankers Pestonji and Viccaji. Note that this is peremptory order in this matter. The date the 25th Rabiul—awal 1254 (i. e. June, 1838).

Ibrahim Khan, Naid (In Persian), Peith Mashirabad." This document was held by the Judge who tried the case to be a genuine document, a finding for which he assigned cogent reasons. The learned Judge who heard the case on appeal pointed out a variety of circumstances which he thought threw suspicion upon the document. But he did not overrule the finding of the first Court that it was genuine. Their Lordships see no sufficient reason why they should reject that finding.

The next document of high importance is the following :

This is to certify that the Parsis of Secunderabad have permission by order of Brigadier Wahab, C. B., Commanding Hyderabad Subsidiary Force to enclose the hill by name Nomavunghutt for a burying place, the circumference of which is about (18) eighteen hundred feet, and immediately adjoining the South end of Nawganah's garden and near the public Bearer's line in rear of the Cantonment of Secunderabad.

"This hill is given for a Tower only to be built on its summit.

H. F. F. CONSIDINE,

*Assistant Quarter-Master-General,
Hyderabad Subsidiary Force.*

"Assistant Q.-M.-General's Office,
Head-quarters Hyderabad
Subsidiary Force."

"Secunderabad, 15th January 1839."

That document was actually obtained on behalf of the two brothers, through their agent, but it is the matter upon which the respondents chiefly rest their case. Their contention is that that document formed the real root of title to the land in question and that by its terms the grant was one to the Parsi community generally and not to the two brothers personally.

Before examining these two documents and their relation one to the other, it is well to consider, the authority from which each document issued, and the relation of those authorities one to the other. The first of the two documents clearly was issued by an officer of the Hyderabad State, and it purports to express a transaction by which the State had assented to the grant

of the land to the two brothers, and directed possession of it to be delivered to them. The second document purports to be issued by the authority of the Brigadier Commanding the Hyderabad Subsidiary Force, a force which had its head quarters in the Secunderabad Cantonment.

The establishment of the Subsidiary Force, and its modifications from time to time, may be collected from Aitchison's Treaties, Vol. 8, at and after p. 264, and from the various treaties and agreements which follow. It was a Force in the employment of the East India Company, and commanded by the Company's Officers, but maintained, by agreement, in Hyderabad Territory for the protection of the Nizam.

The research of counsel was unable to discover any treaty prescribing the limits of the powers of the Nizam's officers on the one hand, and the Military Commander on the other, with respect to the management, control, and disposition of the Cantonment and the land comprised in it. And it appears clear that no such treaty ever was in existence.

When the Nizam's Government admitted a British Force within its territory, and allotted to it the Secunderabad Cantonment as its Head-quarters, it no doubt, by necessary implication, conveyed to the military authorities all powers of jurisdiction, control, and management incident to maintaining the efficiency and the discipline of the troops, and the peace and good order and convenient use of the Cantonment. But it would be going a long way beyond this to hold that the officer commanding the troops could be held empowered to alienate, in perpetuity, land forming part of the Cantonment, and undoubtedly Hyderabad territory, for a purpose wholly unconnected with military requirements. These considerations must be borne in mind in estimating the effect of the two documents which have been cited.

There appears to be no real difficulty in reconciling the two documents, and appreciating their effect. The first, emanating from the State, purports to deal with, and enforce, a grant of the land by the State to the two founders by name, and the delivery of possession to them. The second document, emanating from the Cantonment Authorities, does not deal with title or possession, but gives permission to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land. These are matters obviously within the discretion of the commanding officer, for they might affect the convenient occupation of the Cantonment. The effect of the two documents

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is to show a good title in the founders, and not in the Parsi community.

What happened afterwards only confirms this view. The founders admittedly enclosed the land, and erected a Tower of Silence upon it, at their own expense. About the same time, or shortly afterwards, they erected a Fire Temple upon the land which they acquired by private purchase, and endowed it.

The evidence as to the possession, management and control of the Tower of Silence and of the land on which it stood, shows these to have been in the founders. The only question being who were the original grantees, the events of the early years, after the acquisition of the land and the erection of the Tower, are much more important than those of later years when the circumstances of the parties had somewhat changed. And in those early years we find, from the correspondence, that the priests referred such difficulties or questions as arose for the orders of the founders, and obeyed those orders.

The founders certainly, down to the year 1863, bore the whole expense of the establishment, and all costs of maintenance and repair. During those years the Parsi community were not represented by any Committee, or other organization. Therefore during those years, the founders had no rivals in respect of possession and control, for the suggested possession and authority of the head priest is negatived by his own letters to the founders.

After 1863, the Parsi community from time to time subscribed money in aid of additions and improvements, and from 1882 onwards there was a Committee representing, in some sense, the community. But what happened in these later years can throw but little light upon the nature of the grant of, or soon after, 1837.

Their Lordships are of opinion that the view of the case taken by the Judge who tried it was correct. They will humbly advise His Majesty that the decree of the Judicial Commissioner should be discharged with costs, and that of the Court of the Superintendent restored. The respondents will pay the costs of this appeal.

Messrs. Payne and Lattey—Solicitors for the Appellants.

Messrs. Lattey and Hart—Solicitors for the Respondents.

J. M. P.

Appeal allowed.

CIVIL REFERENCE.

Before Mr. Justice Brett and Mr. Justice Doss.

AKSHAY KUMAR SAHA

v.

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March, 3.

*Provincial Small Cause Courts Act (IX of 1887), Schedule II, clause 8—
‘Judge of the Court of Small Causes,’ meaning of, if it means and
includes Munsiffs and other Judicial officers vested with Small Cause Court
powers.*

The expression, “the Judge of the Court of Small Causes” in clause (8) of the Second Schedule of the Provincial Small Cause Courts Act, must be taken to apply either to the Judge of the Court of Small Causes constituted under the Act or of a Court invested with the jurisdiction of a Court of Small Causes.

Where, therefore, the Local Government purporting to act under clause (8), Schedule II of the Provincial Small Cause Courts Act, by a Notification in the Official Gazette, invested in general terms the Munsiffs of a certain place, with authority to exercise jurisdiction with respect to suits for the recovery of rent of homestead lands up to a certain value, and empowered such Munsiffs to try such suits under the Small Cause Court procedure, such Munsiffs, if invested with the jurisdiction of a Court of Small Causes, are competent to entertain and try such suits as a Court of Small Causes.

Reference under section 646B of the Code of Civil Procedure.

The facts material for the purposes of this Report are these.

In 1907, one Akshay Kumar Saha brought a suit in the Second Court of the Munsiff of Sealdah, against one Hira Lal Dosadh for the recovery of a sum of Rs. 39-8 as arrears of rent of homestead land situated within the local area of the Munsiff’s jurisdiction. The Munsiffs of Sealdah and Alipore, had previously by a Notification (No. 1778 J. D., dated the 21st June, 1904), in the *Calcutta Gazette*, been invested by the Local Government, under clause (8) of the Second Schedule of the Provincial Small Cause Courts Act, with authority to exercise jurisdiction with respect to suits for the recovery of rent of homestead lands up to the value of Rs. 50, within the local areas of the jurisdiction of such Munsiffs. On the 27th June, 1904, Baboo Kunja Behary Gupta, before whom the rent suit was instituted, was appointed Munsiff of the Second Court of Sealdah

* Civil Reference No. 3A of 1908 by C. P. Beacheroff, Esq., District Judge, 24 Parganas, dated the 3rd October 1907.

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and was invested with the jurisdiction of a Court of Small Causes within the local area of the Munsiff to entertain and try suits cognizable by the Small Cause Court up to the value of Rs. 100. Accordingly the Munsiff transferred the rent suit from his file of ordinary Civil suits to that of Small Cause Court suits and tried it as such, and dismissed it on the merits.

Against this decision, the plaintiff preferred an appeal to the District Judge of Twenty-four Perganas, and in the alternative, applied to him to make a Reference to the High Court under section 646B, to revise and set aside the decision on the ground *inter alia*, that the Munsiff had no jurisdiction to try the suit as a Court of Small Causes, and that the Government Notification was *ultravires*. The District Judge wrote out a judgment in the appeal, but being of opinion, that no appeal lay to him, referred the case to the High Court under section 646B of the Code of Civil Procedure, expressing his views that the Government Notification was *ultravires* and that the Munsiff had no jurisdiction to try the suit under Small Cause Courts procedure. His reasons in support of the Reference were couched in the following terms as embodied in his judgment :

" This is an appeal in a case tried under Small Cause Court procedure by the Munsiff, 2nd Court, Sealdah, with an alternative prayer for a Reference to the High Court under section 646B of the Code of Civil Procedure, as an important question of jurisdiction was involved. Before registering the appeal, I have heard both sides on the question of jurisdiction.

Three Notifications in the *Calcutta Gazette* bear on the present question. All appear in the issue of the 29th June, 1904 at pages 946 and 949 of Part I. By Notification No. 1778 J. D. the Munsiffs of Alipore and Sealdah were vested under clause VIII of the Second Schedule of the Provincial Small Cause Courts Act (IX of 1887) with power to try under Small Cause Court procedure suits for the recovery of rent of homestead land when the value did not exceed Rs. 50. By Notification No. 1776 J. D. the Munsiff of the Second Court, Sealdah was appointed to be Registrar of the Court of Small Causes of Sealdah under section 12 of Act IX of 1887 and was vested with power to try suits of Small Cause Court class up to Rs. 20 within the local limits of the Court of Small Causes of Sealdah. By Notification No. 2174 J. D. Babu Kunja Behary Gupta who decided the present suit was appointed to be a Munsiff at Sealdah and was vested with Small Cause Court powers up to

Rs. 100 with respect to that portion of the Munsiff lying outside the limits of the jurisdiction of the Small Cause Court proper. The position therefore, was that by these Notifications the officer in question had Small Cause Court powers up to Rs. 20 as Registrar within the limits of the Small Cause Court proper and up to Rs. 100 outside those limits and within the Munsiff and special powers in respect of the rent of homestead lands up to Rs. 50 within the Munsiff.

The appellant's argument is that the Notification giving special powers in respect of the rent of homestead lands is *ultra vires*. Act IX of 1887 makes a distinction between Courts of Small Causes and Courts invested with the jurisdiction of Courts of Small Causes, and that it is only Courts of the former class that can be invested with special powers under clause 8 of the Second Schedule.

Section 5 of the Act provides for the establishment of Courts of Small Causes. They may be established by the Local Government with the previous consent of the Governor-General in Council. Section 25 of Act XII of 1887, the Bengal North-Western Provinces and Assam Civil Courts Act empowers the Local Government to confer upon Sub-Judges and Munsiffs the jurisdiction of Judges of Courts of Small Causes. This no doubt contemplates the special powers being given to officers personally and not by reason of their holding certain posts. Section 32 of Act IX of 1887 makes provisions in the case of officers so appointed : It puts them on the same footing as Judges of Courts of Small Causes so far as regards the exercise of jurisdiction. Section 15 of the same Act prohibits a Court of Small Causes from taking cognisance of suits specified in the Second Schedule. Among these suits are suits for the recovery of rent other than house rent, but clause 8 of the Second Schedule empowers the Local Government to expressly invest a Judge of a Court of Small Causes with an authority to exercise jurisdiction with respect to suits for rent. If the words "Judge of the Court of Small Causes" include an officer vested under the Civil Courts Act with Small Cause Court powers, then the Munsiff in the present case had jurisdiction ; if they do not, the Notification 1778 J. D. was *ultra vires*, and the Munsiff had no jurisdiction to try the suit under Small Cause Court powers.

Section 4 of Act IX of 1887 defines a Court of Small Causes. It means a Court of Small Causes constituted under the Act and includes any person exercising jurisdiction under the Act in any such Court. The only Courts constituted under the Act are

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those established under section 5 with the previous consent of the Governor-General in Council. The concluding words of section 4 will not extend the meaning of officers who have been vested with jurisdiction under the Civil Courts Act, for they refer only to officers exercising jurisdiction in any such Court *i.e.*, a Court constituted under the Act IX of 1887. The concluding words simply mean that the phrase "Court of Small Causes" includes the Judge presiding in the Court. The distinction between the two classes of Courts is observed in section 5, Code of Civil Procedure. The respondent's pleader argues that the Munsiff had jurisdiction because he had been appointed Registrar of the Small Cause Court and had under section 12 (3) been given power to try Small Cause Court suits up to Rs. 20. He argues that because the Munsiff had judicial powers as Registrar, he was a Judge within the definition in section 2 of the Civil Procedure Code, and therefore, he was a Judge of Small Cause Courts, and, therefore, his case comes within the terms of clause 8 of Schedule II. As a Registrar with judicial powers, he is no doubt a Judge within the meaning of section 2 of the Civil Procedure Code, but that only makes him a Judge of the Small Cause Court, so far as his jurisdiction as Registrar extends *i.e.*, within the limits of the Court of Small Causes proper. It cannot by double interpretation make him a Judge of Small Cause Court without those limits, and it would be an anomaly that while the Act limits his jurisdiction as Registrar to suits the value of which does not exceed Rs. 20, he should by reason of the fact that he happens to be Registrar within the limits of the Small Cause Court proper be deemed to have jurisdiction outside those limits in a class of suits which the Act provides shall not ordinarily be tried even by the Judge of a Small Cause Court under Small Cause Court procedure. Further I am of opinion that even if a Registrar of a Court of Small Causes is a Judge of a Court of Small Causes within the meaning of clause 8 of the Second Schedule, he could not be empowered to try suits under that clause the value of which exceeds Rs. 20 seeing that section 12 of the Act limits his jurisdiction to that amount, much less then can he as a Munsiff merely because he happens also to be Registrar, be vested under that clause with jurisdiction to try suit under Small Cause Court procedure up to Rs. 50. But as I have said, I think the powers which may be given under clause 8 are restricted to Judge of Small Cause Court proper and cannot be extended to officers

who have been given Small Cause Court powers under the Civil Courts Act. I am, therefore, of opinion that Notification No. 1778 J. D. was *ultra vires* and that the Munsiff had no jurisdiction to try this case under Small Cause Court procedure.

It may be noted that objection was taken in the lower Court to the jurisdiction of Court.

I accordingly refer the case under section 646 B., Code of Civil Procedure, for orders of the High Court."

Babu Jnanendranath Bose in support of the Reference :—The Notification is *ultra vires* and the Munsiff had no jurisdiction to try the suit under the Small Cause Court procedure. The expression, "the Judge of the Court of Small Causes" in clause 8 of the Second Schedule of the Act means and refers only to the Judge of the Small Cause Court proper, constituted under section 5 of the Act. The term "Judge" is defined in section 6 of the Act, and looking to the provisions of sections 6 to 11, we find who is meant by the expression. We should look to the definition of the term "Judge" as given in the Act in interpreting the expression. A reference to the language used in sections 18 to 22 and 31 would make the meaning clear. In these sections the term "Judge" clearly means the Judge of the Small Cause Court proper, and there is no reason, why a different interpretation should be put upon the expression, when used in clause 8 of the Second Schedule. The reason is also obvious. Subordinate Judges of ripe and mature experience are, as a rule, appointed Small Cause Court Judges, and it is but reasonable that the Legislature should contemplate the vesting of such experienced judicial officers with the power of trying rent suits other than house rent, under the Small Cause Court procedure. See the observations in *Dulal Chandra v. Ram Narain* (1).

In the next place, the expression, "the Court of Small Causes" in clause 8, must mean and refer to the Court of Small Causes constituted under the Act, and does not include judicial officers vested with Small Cause Court powers under the Assam, Bengal and North-Western Provinces Civil Courts Act. The expression is defined in the Act itself. See sections 4 and 5. This restricted meaning has been given to the expression by the Bombay High Court in the case of *Ram Chandra v. Ganesh* (2) which has been approved by this Court in *Dulal Chandra v. Ram Narain* (1).

(1) (1904) I. L. R. 31 Calc. 1057 at 1061-1062.

(2) (1898) I. L. R. 23 Bom. 382 at 384.

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Section 33 of the Provincial Small Cause Courts Act and section 5 of the Code of Civil Procedure also draw a clear distinction between the Court of Small Causes and a Court invested with the jurisdiction of a Court of Small Causes.

And lastly, looking at the dates of the Notification and of the appointment of Babu K. B. Gupta as Munsiff of Sealdah and of his being invested with Small Cause Court jurisdiction, and looking at the most vague and general terms in which the Notification is couched, the Munsiff had no authority under the Notification.

[Brett J.—That point does not arise on the Reference. It is a new point altogether, and we cannot allow it to be raised here.]

Babu Provas Chunder Mitter for the Opposite party was not called upon.

The judgment of the Court was delivered by

Brett J.—In dealing with this Reference we propose to confine ourselves to the question which is referred to us by the learned Judge for determination. The question whether clause (8) of the Second Schedule of the Provincial Small Cause Courts Act which provides that “a suit for the recovery of rent, other than house rent, is excluded from the jurisdiction of a Court of Small Causes unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto,” is confined to the Judge of Courts of Small Causes constituted under the Provincial Small Cause Courts Act or may be taken to apply to the Judges of Courts invested with the jurisdiction of Courts of Small Causes under any other enactment. The learned District Judge expresses the opinion that the clause of the Schedule is so restricted.

We have carefully considered the circumstances of the case and are of opinion that there are not sufficient grounds to support the view that it was the intention of the Legislature to restrict the clause in the manner suggested. In this case the Munsiff, Second Court, Sealdah, was invested with the power to try such suits under clause (8) of the Second Schedule of the Provincial Small Cause Courts Act by Notification in the Calcutta Gazette of the 21st June 1904. Section 32 of the Provincial Small Cause Courts Act provides that so much of Chapters III and IV as relates to the nature of suits cognizable by Courts of Small Causes, applies to Courts invested by or under any enactment for the time being in force with the jurisdiction of a

Court of Small Causes so far as regards the exercise of that jurisdiction by those Courts ; and we think that in order to determine the question before us it is necessary that we should read clause (1) of section 15 with clause (8) of the Second Schedule of the Provincial Small Cause Courts Act. So read, the section and clause will run as follow : A Court of Small Causes or a Court invested by or under any enactment for the time being in force with the jurisdiction of a Court of Small Causes shall not take cognizance of a suit for the recovery of rent other than house rent unless the Judge of the Court of Small Causes has been expressly invested by the Local Government with authority to exercise jurisdiction with respect thereto. So read, the expression, " the Judge of the Court of Small Causes," in clause (8) of the Second Schedule must be taken to apply either to a Court of Small Causes constituted under the Act or to a Court invested with the jurisdiction of a Court of Small Causes. In the case before us the Munsiff who tried the suit was a Court invested with the jurisdiction of a Court of Small Causes, and we, therefore, hold that under the provisions of clause (8) of the Second Schedule of the Act, read with sections 15 and 32 of the Act, he had power to try the suit for recovery of the rent of homestead lands.

The opposite party is in our opinion entitled to the costs of this hearing which we fix at two gold mohurs.

B. M.

Reference answered in the negative.

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APPELLATE CIVIL.

Before Mr. Justice Mookerjee and Mr. Justice Caspersz.

MIRZA SHAMSHER BAHADUR AND OTHERS

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August, 23, 26, 29.

v.

KUNJ BEHARI LALL AND OTHERS.*

Admission in the judgment, when a party can question—Revenue survey map, evidence of title—Jungle and hilly lands—Ejectment, suit for—Onus of proof—Suit for possession, plaintiff to prove what—Possession, constructive, doctrine of.

It is not open to the party to challenge the accuracy of his admission contained in the judgment, in the Court of appeal. If the admission was not as a matter of fact made, or if it was substantially different from that it was taken by the Court to be, the proper course for the party is to apply for a review of judgment.

The Revenue Survey maps are evidence of title and possession, and till that evidence is rebutted by other evidence of title, effect should be given to the state of things as indicated by the Revenue Survey maps.

Maharaja Jogadindra v. The Secretary of State (1) referred to.

In respect of jungle and hilly lands possession must be presumed to be with the rightful owner.

Mahomed Ali Khan v. Khaja Abdul Gunny (2) and *Raj Kumar Roy v. Gobind Chunder Roy* (3) referred to.

The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests,—all these matters greatly varying, under various conditions, are to be taken into account in determining the sufficiency and effectiveness of possession.

The plaintiff in an action for ejectment must prove possession, actual or constructive, within 12 years before suit. If the condition of the disputed property was such that it did not admit of actual occupation, the presumption is that legal possession continued with the rightful owner, and it is sufficient for the plaintiff to prove either that the property continued in such state within 12 years of the suit or that the condition continued up to a date so near the 12 years that the natural and probable inference is that the condition of the property was similar up to a date within 12 years of the suit. If this is established by the plaintiff, the presumption would be that the possession of the plaintiff also continued within 12 years of the suit. This presumption, however, is rebuttable and the defendant may show that he has been in actual occupation of the property or of any portion thereof for more than 12 years

* Appeal from Appellate Decree No. 164 of 1906, against the decision of C. E. Pittar Esq., District Judge of Gya, dated the 9th November 1905, modifying that of Babu Annada Prosad Bagchi, Subordinate Judge of Gya, dated the 23rd January 1905.

(1) (1902) L. R. 30 I. A. 44 (53); 1 L. R. 30 Calc. 291; 5 Bom. L. R. 1.

(2) (1883) I. L. R. 9 Calc. 744; 12 C. L. R. 257.

(3) (1891) I. L. R. 19 Calc. 660; L. R. 19 I. A. 140.

before suit. If the presumption is thus rebutted and the adverse possession of the defendant is proved in respect of any portion of the property, the suit of the plaintiff must fail to that extent.

Sahib Perhlad Sein v. Rajendra Kishore Singh (1), *Nitrasur Singh v. Nund Lal Singh* (2), *Mahomed Ali Khan v. Khaja Abdul Gunny* (3), *Mohima Chunder v. Mohesh Chunder* (4) and *Mahammud Amanulla v. Badan Singh* (5), referred to.

Innasimuttu v. Upakarath Udayan (6), explained.

Where the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner.

Runjeet Ram v. Goburdhun Ram (7) referred to.

The doctrine of constructive possession applies only in favour of the rightful owner and must not as a rule be extended to a wrong doer whose possession must be confined to land which he is actually in possession.

Mohini Mohan v. Promoda Nath (8) referred to.

The principle upon which the doctrine of constructive possession is based stated.

Appeal by the Defendants.

Suit for declaration of title and for possession.

The facts of the case and arguments appear sufficiently from the judgment of the Court.

Mr. Caspersz and Babus Umakali Mukerji and Kulwant Sahay for the Appellant.

Mr. O'Kinealy (Advocate-General) and Babus Ram Charan Mitra, Lal Mohun Doss, Chandra Sekhar Prosad Singh and Prokas Chunder Sirkar for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—The subject matter of the litigation giving rise to this appeal consists of three large tracts of land in the *kittas* called Bharkalwar, Bhaya Bigha and Gordog, which are claimed by the plaintiffs respondents as included within their Mouzah Baliari, 1345 bighas out of the disputed lands are said to be covered by hills and jungles and the remainder, about 200 bighas, are under cultivation. Out of the latter area 138 bighas are situated in Bharkalwar and 62 bighas in Gordog.

The plaintiffs alleged that at the time of the settlement proceedings, the defendants claimed possession of all these lands under a deed of gift executed in their favour on the 28th April 1875 by the Maharaja of Deo, a neighbouring zemindar now

(1) (1869) 12 M. I. A. 292 (337).

(2) (1860) 8 M. I. A. 199.

(3) (1883) I. L. R. 9 Calc. 744; 12 C. L. R. 257.

(4) (1888) I. L. R. 16 Calc. 473; L. R. 16 I. A. 23.

(5) (1889) I. L. R. 17 Calc. 137.

(6) (1899) L. R. 26 I. A. 210; I. L. R. 23 Mad. 10.

(7) (1873) 20 W. R. 25 (P. C.).

(8) (1896) I. L. R. 24 Calc. 256.

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represented by the 5th and 6th defendants to this suit. The Settlement Officer held that although according to the Revenue Survey maps, the lands of Bharkalwar and Gordog were included in Mouzah Baliari, they were in the actual occupation of the defendants. The plaintiffs contend that the effect of this decision of the Settlement Officer was practically to place them out of possession. They consequently commenced this action for declaration of title and for recovery of possession. The claim was resisted on various grounds amongst which it is sufficient to mention the pleas of limitation and denial of the title of the plaintiffs. The Court of first instance came to the conclusion that the whole of the disputed area was situated within the zemindari of the plaintiffs. Upon the question of limitation, that Court held that as regards the lands covered by hills and jungles, the plaintiffs were in possession, actual or constructive, within 12 years of the suit. As regards the cultivated lands, the Subordinate Judge held that the plaintiffs were in possession of the 62 bighas in Gordog within the statutory period and that the cultivation by the defendants of these lands commenced about six years before the suit. As regards the 138 bighas in Bharkalwar, however, the Subordinate Judge found that the plaintiffs had failed to prove their possession within 12 years, and that the undisputed documentary evidence justified the conclusion that these lands had been under cultivation from a period antecedent to 12 years before the suit. In this view of the matter the Subordinate Judge made a decree in favour of the plaintiffs for the jungle and hilly lands of Bhaya Bigha and the cultivated lands of Gordog but dismissed the suit in respect of the cultivated lands of Bharkalwar.

The plaintiffs as well as the defendants appealed against this decree, the former in respect of the lands the claim to which had been dismissed, and the latter in respect of the lands for which the claim had been allowed. The whole question of title and possession, therefore, was reopened in the appeal. At the hearing before the District Judge it was admitted on behalf of the defendants that in default of other evidence of title, the Revenue Survey maps must be accepted as evidence of title and possession and that according to these maps the lands in dispute appertained to mouzah Baliari which was admittedly the property of the plaintiffs. The District Judge, therefore, held that the conclusion of the Subordinate Judge upon the question of title to all the disputed lands must be affirmed. Upon the question of possession

the District Judge held that in respect of the jungle and hilly lands the possession must be presumed to be with the original owner, especially as the evidence of the defendants was inadequate to prove any actual possession over such lands. In respect of the cultivated lands of Gordog, the District Judge held that the defendants were in possession for about 6 or 7 years, and that the plaintiffs had been previously in possession thereof. As regards the cultivated lands of Bharkalwar, the District Judge held that the *onus* was upon the defendants to prove adverse possession for more than 12 years, and as they had failed to do so, and as the possession of the plaintiffs must be presumed to have continued until the defendants came into occupation, the title of the plaintiffs to these lands could not be taken to have been extinguished. In this view of the matter, the District Judge allowed the appeal of the plaintiffs and dismissed the appeal of the defendants. The result was that the entire claim of the plaintiffs was allowed.

Against this decree the defendants have appealed to this Court, and on their behalf the decision of the District Judge has been assailed substantially on two grounds, namely, *first*, that the question of title has not been properly investigated inasmuch as the District Judge misunderstood the legal effect of the admission which was made before him, and *secondly*, that upon the question of limitation, he ought not to have thrown the burden of proof upon the defendants in respect of any portion of the claim.

In support of his first contention, learned counsel for the appellants has contended that there was no intention on the part of the defendants to abandon the question of title and that the District Judge ought to have determined that point upon the whole of the evidence on the record. It is clear however on the judgment of the District Judge that the defendants admitted that in default of other evidence of title, the Revenue Survey map of 1843 must be accepted as evidence of title and possession and that according to those maps, the lands in dispute appertained to the zemindari of the plaintiffs. As to the factum of the admission, it is not open to the defendants to challenge the accuracy of the statement contained in the judgment of the District Judge. If the admission was not as a matter of fact made, or if it was substantially different from what it was taken by the District Judge to be, the proper course for the defendants was to apply for a review of judgment, because the District Judge and he alone was competent to state with any approach to accuracy, what was the precise admission which had been made before him.

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We must, therefore, proceed on the assumption that the admission stated in the judgment of the District Judge was as a matter of fact made. This admission, it will be observed, is divisible into two parts. The first branch of the admission is that in default of other evidence of title, the Revenue Survey maps must be accepted as evidence of title and possession. This admission is in accordance with what must now be taken to be the settled law as pointed out by their Lordships of the Judicial Committee in the case of *Maharaja Jagadindra v. The Secretary of State* (1), where their Lordships affirmed the view taken by this Court in the case of *Satcouri Ghosh v. The Secretary of State* (2), that Revenue Survey maps are admissible as evidence of possession and consequently of title. The Privy Council state that maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons as to be admissible and valuable evidence of the state of things *at the time they are made*. They are not conclusive and may be shown to be wrong, but in the absence of evidence to the contrary, they may be properly and judicially received in evidence as correct when made. When, therefore, in the Court below it was admitted on behalf of the defendants that the Revenue Survey maps must be accepted as evidence of title and possession, the admission was in accordance with settled law. Even if such admission had not been made, the District Judge would have been perfectly justified in his conclusion that the Revenue Survey maps are evidence of title and possession, and that till that evidence was rebutted by other evidence of title, effect must be given to the state of things as indicated by the Revenue Survey maps.

The second branch of the admission was that the lands in dispute are shown by the Revenue Survey map of 1843 to appertain to Mouzah Baliari. This was an admission upon a question of fact. It has not been suggested before this Court that the Revenue Survey map of 1843 does not bear out this statement. We must take it, therefore, that the admission upon this part of the case was correct and that the Revenue Survey map of 1843 does show that the disputed lands were at the time found to appertain to the zemindari of the plaintiffs. The conclusion, therefore, seems to us to be irresistible that the finding of the District Judge upon the question of title cannot be assailed,

(1) (1902) L. R. 30 I. A. 44 (53); I. L. R. 30 Calc. 291.

(2) (1894) I. L. R. 22 Calc. 252 (257).

and we must proceed on the assumption that the plaintiffs have established their title to the whole of the lands in controversy.

The second ground urged on behalf of the appellants relates to the question of limitation, so far as this question touches the jungle and hilly lands of Bhaya Bigha and the cultivated lands of Gordog, we are of opinion that the judgement of the District Judge cannot be successfully assailed. In respect of the jungle and hilly lands, possession must be presumed to be with the rightful owner, that is, with the plaintiff in this case. This view is supported by the decision of this Court in the case of *Mahomed Ali Khan v. Khaja Abdul Gunny*(1) and by the decision of their Lordships of the Judicial Committee in *Raj Kumar Roy v. Gobind Chunder Roy* (2). As regards the cultivated lands of Gordog, the District Judge has found that the evidence of the defendants themselves establishes that they had no possession of these lands at a period earlier than 6 or 7 years before the institution of this suit. The plaintiffs, therefore, have not lost possession of the cultivated lands in Gordog for more than 6 or 7 years. There is consequently no bar to their recovery of possession so far as these lands are concerned.

As regards the cultivated lands of Bharkalwar, however, the position is different. The District Judge holds that in respect of these lands the defendants are bound to prove adverse possession for more than 12 years, because the plea that the title of the plaintiff has been extinguished by adverse possession, is taken by the defendants and it is for them to establish it. In our opinion, this view cannot be sustained. It is now firmly settled, beyond all possibility of controversy, that the plaintiff in an action for ejectment must not only prove his title but also his possession within 12 years of the suit. This is clear from the cases of *Sahib Perlhadd Sein v. Rajendra Kishore Singh*(3) and *Netrasur Singh v. Nund Lall Singh* (4). The same view was subsequently affirmed by a Full Bench of this Court in the case of *Mahomed Ali Khan v. Khaja Abdul Gunny* (1). Subsequent to the decision of the Full Bench, the same view has been reaffirmed by their Lordships of the Judicial Committee in the cases of *Mohima Chunder Mozumdar v. Mohesh Chunder Neoghi* (5) and *Nawab Mahammad Amanulla Khan v. Badan Singh* (6).

It was argued, however, by the learned Advocate-General on behalf of respondents that the decision of the Judicial Committee

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(1) (1883) I. L. R. 9 Calc. 744.

(4) (1860) 8 M. I. A. 199.

(2) (1891) I. L. R. 19 Calc. 660.

(5) (1886) I.L.R. 16 Calc. 473 : 16 I.A. 26.

(3) (1869) 12 M. I. A. 337.

(6) (1889) I. L. R. 17 Calc. 137.

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in the cases to which reference has been made do not lay down any general rule of law and must be restricted in their application to the particular circumstances of the case then before the Court. He further suggested that as a matter of principle, a plaintiff who has established his title ought to succeed unless the defendant can prove a better title or establish that he has acquired a good title by adverse possession which has extinguished the title of the plaintiff. We are unable to accept either branch of this contention. There can be no question that the rule laid down by their Lordships of the Judicial Committee is of general applicability, and in our opinion, there is good reason for it. The plaintiff who brings an action for ejectment has to establish not merely that he had title at some remote period antecedent to the suit. In order to entitle him to succeed, he must establish that he had a valid subsisting title at the date of the institution of the suit, in other words, he has to prove not only that he has title, but also that he has been in possession within 12 years before the suit.

This view may at first sight seem to be not quite consistent with what is implied in the decision of their Lordships of the Judicial Committee in *Innasimutu Udayan v. Upakarath Udayan* (1). In that case, the plaintiff who sued to eject the defendant admitted the possession of the latter for seven years, next before the suit, and the defendant produced documentary evidence of possession during the preceding five years which was exactly similar in kind to the evidence which accompanied his possession during the seven years. In these circumstances, counsel for the defendant before the Judicial Committee appears to have taken upon himself to prove that there was *prima facie* evidence of the possession of the defendant for 12 years, and to have contended that this shifted the *onus* upon the plaintiff to show that the possession of the defendant began within 12 years of the suit. It was in these circumstances that the Judicial Committee held that the documentary evidence of possession exactly similar in character to what accompanied the admitted possession went back far behind that 2 years in question and that this was sufficient to throw on the plaintiff the burden of rebutting the reference arising from the fact of possession accompanied by these documents. Their Lordships held upon an estimate of the conflicting evidence that this burden had not been sustained by the plaintiff. In fact the case for the defendant was so strong

(1) (1899) L. R. 26 I. A. 210 ; I. L. R. 23 Mad. 10,

that it was not necessary for him to contend that the fact of the admitted possession of the defendant for 7 years was sufficient to throw the burden upon the plaintiff to prove that he had been in possession within 12 years of the suit. This decision of the Judicial Committee cannot consequently be taken to weaken in any way the effect of the earlier decisions to which we have already referred. We hold, therefore, that in an action for ejectment, the *onus* is on the plaintiff to prove his title, and to show that he was in possession and was dispossessed of the disputed property within 12 years before the date when he filed the suit.

The question may, however, and does in fact frequently, arise as to what is necessary for the plaintiff to prove in order to establish his possession within 12 years of the suit. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests, all these matters greatly varying, as they must, under various conditions, are to be taken into account in determining the sufficiency and effectiveness of possession. For instance, where land has been shown to have been in a condition unfitting it for actual enjoyment in the usual mode at such a time and under such circumstances that, that state naturally would, probably did continue until 12 years before the suit, it may properly be presumed that it did so continue and that the plaintiffs' possession continued also until the contrary is shewn; see *Muhammed Ali Khan v Khaja Abdul Gunny* (1). In substance, therefore, we have arrived at the conclusion that the plaintiff in an action for ejectment must prove possession actual or constructive, within 12 years before suit. If the condition of the disputed property was such that it did not admit of actual occupation, the presumption is that legal possession continued with the rightful owner, and it is sufficient for the plaintiff to prove either that the property continued in such state within 12 years of the suit or that the condition continued up to a date so near the 12 years that the natural and probable inference is that the condition of the property was similar up to a date within 12 years of the suit. If this is established by the plaintiff, the presumption would be that the possession of the plaintiff also continued within 12 years of the suit. This presumption, however, is rebuttable and the defendant may show that he has been in actual occupation of the property or of any portion thereof for more than 12 years before suit. If the presumption is thus rebutted

(1) (1888) I. L. R. 9 Calc. 744.

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and the adverse possession of the defendant is proved in respect of any portion of the property, the suit of the plaintiff must fail to that extent.

Now in the case before us, the District Judge has not found what was the condition of the land in Bharkalwar at a period about 12 years before the date of the institution of the suit. All that he has found is that the Survey map of 1843 shows that at the time of the survey the lands were jungle. This, however, does not necessarily lead to the presumption that the lands continued to be jungle up to the 11th April 1892, within 12 years of which date the present action was commenced. We start with the possession of the plaintiffs over jungle lands in 1843, but there is no finding as to the subsequent condition of the property.

In these circumstances, it is impossible to support the decision of the District Judge upon this part of the case. The presumption which he raised in favour of the plaintiff would be available only so long as the lands continued to be jungle. The presumption, however, would cease to be operative after the land was cleared of jungle and was brought under cultivation. This part of the case, therefore, must be retried. The District Judge must in the first instance direct his attention to the condition of the land at a period of 12 years antecedent to the suit. If he finds that the land at that time was covered with jungle, or that at a period not very remote from that time, the land was jungle so as to justify the inference that the same condition continued at a time just within 12 years of the suit, the plaintiffs are entitled to the benefit of the presumption that they had constructive possession as rightful owners. When the District Judge deals with this part of the case, he may, if the state of the evidence justifies it, apply the principle laid down by their Lordships of the Judicial Committee in *Runjeet Ram Pandey v. Goburdhun Ram Pandey* (1), namely, where the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner. If the District Judge comes to the conclusion that the plaintiff has made out a *prima facie* case and is, therefore, entitled to the benefit of the presumption, he will next consider whether the defendants have been able to rebut that case by their evidence. When he deals with this part of the case, regard must be had to the principle of law that a trespasser is not entitled to the benefit of constructive possession. It was ruled by this Court in the case of *Mohini Mohan Roy v. Fromoda*

(1) (1878) 20 W. R. 25.

Nath Roy (1) that the doctrine of constructive possession applies only in favour of the rightful owner and must not as a rule be extended to the wrong doer whose possession must be confined to land of which he is actually in possession.

This rule is substantially identical with the principle enunciated by their Lordships of the Judicial Committee in the cases of *Clark v. Elphinistone* (2), *Agency Company v. Short* (3) and *Secretary of State v. Krishnamoni Gupta* (4). In the first of these cases, it was held that as against the rightful owner, the possession of a trespasser is available only when there is actual possession of the disputed land or overt, or physical act of ownership done upon it. The true owner is not affected by *ideal* possession of the land or possession which exists only in the imagination of the parties. In the second case, the Judicial Committee held that when an intruder has relinquished possession, the possession so abandoned leaves the original owner in the same position in all respects as he was before the intrusion took place. In the third case, the Judicial Committee held that when land in the possession of a trespasser is submerged, the possession reverts, in the eye of law, to the original owner.

The principle, upon which this rule of law is based, was elaborately examined by Mr. Justice Story in *Clarke v. Courteney* (5) in which that eminent Judge observed that the reason for the rule is plain. Both parties cannot be seised at the same time of the same land under different titles, and the law, therefore, adjudges the seisin of all which is not in the actual occupancy of the adverse party, to him who has the better title. If a man enters into land having title, his seisin is not bounded by his occupancy but is held to be co-extensive with his title; but if a man enters without title his seisin is confined to his possession by metes and bounds. Where two persons are in possession of land at the same time under different titles, the law adjudges him to have the seisin of the estate who has a better title. Both cannot be seised. Their seisin follows the title. If therefore a mere trespasser without any claim or pretence of title enters into the land and holds the same adversely to the title of the true owner, it is an ouster or disseisin of the latter, but in such cases the possession of the trespasser is bounded by his actual occupancy and consequently the true owner is not disseised except as to the portion so occupied. It follows consequently

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(1) (1896) I. L. R. 24 Calc. 256.

(3) (1888) 13 App. Cas. 793.

(2) (1880) 6 App. Cas. 164.

(4) (1902) I. L. R. 29 Calc. 518.

(5) (1831) 5 Peters, 319; U. S.

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that if the true owner be in possession of a part of the land claiming title to the whole, then his seisin extends by construction of law to all land which is not in the actual possession or occupancy by enclosure or otherwise of the party claiming adversely as a trespasser or under a defective deed or title. This principle has been repeatedly affirmed; See *Hunnycutt v. Peyton* (1); *DeBurton v. Young* (2) and *Smith v. Gale* (3). It follows consequently that if a plaintiff establishes by evidence, direct or presumptive, his possession actual or constructive, of the disputed land in Bharkalwar within 12 years of the suit, and if the defendants are called upon to prove their case of adverse possession for over 12 years in respect of any portion of these lands, the evidence as to their possession must be carefully scrutinized. It must be found in respect of each parcel of land whether the possession of the defendants has extended over 12 years, and such possession if any, must be actual occupation.

The result, therefore, is that this appeal must be allowed in part and the decree of the District Judge modified. So far as the 1345 bighas of jungle and hill lands and 62 bighas of cultivated lands in Gordog are concerned the appeal must be dismissed and the decree of the District Judge affirmed. So far as the 138 bighas of cultivated lands in Bharkalwar are concerned, the appeal must be allowed and the decree of the District Judge reversed. The case, in so far as it relates to these 138 bighas will be remanded to the District Judge in order that he may rehear the appeal in accordance with the observations contained in this judgment.

As regards the costs of this appeal, the respondents have succeeded to a substantial extent. They will, therefore, have half the costs of this appeal. The other half of the costs of this appeal will abide the ultimate result.

Let the records be sent down at once.

A. T. M.

Appeal allowed in part; Decree modified.

(1) (1880) 102 U. S. 333.

(2) (1869) 134 U. S. 255.

(3) (1891) 144 U. S. 526.

*Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and
Mr. Justice Coxe.*

SASHI KUMAR MIRBAHAR

v.

SITANATH BANERJI AND OTHERS.*

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1908.

January, 23.

*Landlord and tenant—Cosharer landlord—Suit for entire rent—Cosharers made
defendants—Maintainability of suit—‘Landlord,’ who is—Assignee of land
as well as of arrears of rent.*

A co-sharer landlord is entitled to maintain a suit for the entire rent, if his co-sharers are on their refusal to join as plaintiffs, made defendants in the suit.

Raja Promoda Nath Roy v. Raja Ramoni Kanto Roy (1) followed.

The person to whom the land, the rent for which is claimed, as also the arrears of rent are transferred is an assignee of the whole interest of the landlord and is a ‘landlord’ within the Bengal Tenancy Act.

Mohendra Nath Kalamoree v. Koilash Chundra (2) distinguished.

Suit for rent.

Appeals by the Defendant.

Dr. Priya Nath Sen and Babu Gunada Charan Sen for the Appellant.

Babu Basanta Kumar Bose for the Respondents.

The material facts and arguments appear from the judgment of Maclean C. J.

The following judgments were delivered :

Maclean C. J.—The first point raised is that the decree was wrong inasmuch as it was a decree for the whole rent. The conclusive answer to that is the recent decision of the Judicial Committee in the case of *Raja Promoda Nath Roy v. Raja Ramoni Kant Roy* (1) delivered on the 11th of December 1907. The case in this Court is reported in 9 Calcutta Weekly Notes, page 34. Then another point was raised, which was not raised in either of the Courts below, which was not taken in the grounds of appeal in the lower appellate Court, and which perhaps ought not to have been allowed to be raised here. It appears that the plaintiff is a transferee from the landlord of the land of which the rent is sought and also of the arrears of rent. It is a suit for recovery of arrears of rent, and the plaintiff says it is governed by Article 2 of Schedule III to the Bengal Tenancy Act. The defendant says

* Appeals from Appellate Decrees Nos. 609 and 648 of 1906 against the decision of Babu Pran Krishna Biswas, Subordinate Judge, Faridpur dated the 20th January 1906 confirming that of Babu Prabha Chandra Sinha, Munsiff of Bhanga, dated the 17th June 1905.

(1) (1907) 7 C. L. J. 139.

(2) (1900) 4 C. W. N. 605.

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it is governed by Article 110 of the Second Schedule to the Limitation Act, and he relies upon the case of *Mohendra Nath Kalamoree v. Koilash Chundra Dogra* (1). But in that case, as the plaintiff was not a transferee of the entire interest of the landlord, the Court held that he was not a 'landlord' within the meaning of the Bengal Tenancy Act. But here the plaintiffs are transferees of the whole interest of the landlord and they stand in the shoes of the landlord and are 'landlord,' within the meaning of the Bengal Tenancy Act. As I have said, this point was not raised in the lower appellate Court, but there is nothing in it.

Both the appeals are dismissed with costs.

Coxe J.—I agree.

N. K. B.

Appeals dismissed.

(1) (1900) 4 C. W. N. 605.

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 January, 6, 7, 17.

Before Mr. Justice Stephen and Mr. Justice Mukerjee.

HARE KRISHNA MAHANTI

v.

BISHUN CHANDRA MAHANTI AND OTHERS.*

Rent Recovery Act (X of 1859), Appeals under—Procedure—Civil Procedure Code (Act XIV of 1882). Secs. 580, 588—Applicability of Civil Procedure Code—Act X of 1859, Sec. 161—Complete Code—Transfer of brief—Pleader not named in vakalatnama—Adjournment—Hearing ex parte—Proper discretion.

Section 580 of the Code of Civil Procedure, and by necessary implication, section 588 also, are applicable to appeals under Act X of 1859 by the operation of section 161 of the Act.

Quære—Whether the proposition that 'Act X of 1859 is a complete Code in itself' requires modification in view of the decision in *Nilmani Singh v Tara Nath Mukerjee* (1).

In an appeal before a District Judge, a respondent engaged two pleaders. On the day of hearing, the leader being ill had transferred his brief to another pleader whom the Judge declined to hear as his name did not appear in the vakalatnama. The junior not being instructed to argue, applied for a day's adjournment to get himself ready. This was refused and the appeal was decreed *ex parte*:

Held, the Judge had erroneously exercised his discretion. He ought either to have allowed the pleader, who appeared, to argue the case or allowed an adjournment, making if necessary, an order for costs in favor of the appellant.

* Appeal from Order No. 471 of 1906 against a decision of J. J. Platel Esq., District Judge of Cuttack dated the 10th September 1906.

(1) (1882) L. R. 9 I. A. 174.

Suit for Accounts.

Appeal by the Defendant.

The material facts and arguments appear from the judgments.

Babu Provas Chandra Mitter for the Appellant.

Babu Ram Chandra Mazumdar for the Respondents.

C. A. V.

The following judgments were delivered :

Stephen J.—The plaintiff respondent in this case, a zeminder sued the defendant, his agent for an account of money received by him under section 24 of Act X of 1859. The suit was properly brought in the Court of the Deputy Collector of Cuttack, and was dismissed. The plaintiff then appealed to the District Judge of Cuttack under section 160 of Act X of 1859 when the appeal was heard *ex parte* and decreed on 12th March 1906. On this the defendant applied for a rehearing under section 560, Civil Procedure Code, or for a review of judgment under section 623. This application was refused by an order of the 16th September against which the present appeal is brought.

On the facts two preliminary objections have been made before us. The first is that the District Judge had no power to entertain the application in which the present order was made : the second, that we have no power to hear this appeal. Though the points are different they rest on the same ground, namely that Act X of 1859 is a complete Code in itself, and that section 558, under which the District Judge purported to act and section 588, Civil Procedure Code, under which we are invited to act had no application to the case. This contention is supported by the decisions in *Nogendra Nath Mullick v. Mathura Mohan Pasi* (1) and *Radha Madhub Santra v. Lukhi Narain Roy Chowdhry* (2), in the latter of which cases it is laid down that Act X of 1859 is "a complete Code in itself" which words it is suggested must be taken to mean that no section of the Code can be taken as applicable to a case arising under the Act. I doubt whether, in view of the Privy Council decision in *Nilmani Singh Deo v. Tara Nath Mookerjee* (3), it would be right to attach this meaning to the words. But it is not necessary to decide this question because, as far as the present case is concerned, the respondent's contention is answered by a study of the contents of the Act itself. It is not disputed that in this case there was an

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(1) (1891) I. L. R. 18 Calc. 368.

(2) (1893) I. L. R. 21 Calc. 428.

(3) (1882) I. L. R. 7 Calc. 295.

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appeal from the Deputy Collector to the District Judge who now represents the zillah Judge, under section 160 of the Act. The procedure to be followed before the Judge is provided in section 161, which runs as follows :—"the rules in force in regard..... to the manner in which such appeals are heard and determined, and to all proceedings which may be had in respect of such appeals, shall be applicable to appeals to the Zilla Judge or Sadar Court under this Act." Here the "rules in force" must mean the rules ordinarily in force in the District Judge's Court, that is, the contents of the Civil Procedure Code ; of these the section 556 contains rules as to the manner in which an appeal will be heard, and if an appellant attends and a respondent does not, an appeal will be heard *ex parte*. Sections 560 and 588 (27) mention proceedings which may be had in respect of such appeal. Consequently the respondent against whom an *ex parte* decree has been made under section 556 may apply to have his case reheard, and if he fails, may appeal to this Court. This view is amply supported by the judgments in *Sadainaik v. Serai Naik* (1) following as it does the Full Bench decision in the Sudder Dewani Adalat Court in *Hallothar Biswas v. Mohesh Chunder Haldar* (2), and *Nilmoni Singh Deo v. Taranath Mukerjee* (3). The result is that the decision appealed from was made on an application that the Judge had power to entertain, and that we have jurisdiction to hear this appeal.

As to the merits of the case there is not much to be said. It is not disputed, when the case came up for hearing on the 8th March 1906, the present appellant had two pleaders, a leader and a junior. The leader was absent through illness, but had arranged that another pleader should do his work. This pleader was prepared to appear in the case but had no vakalatnama. The junior pleader engaged was not prepared to conduct the case relying on the presence of his leader. The result was that the Judge refused to hear the senior pleader who had no vakalatnama, and apparently refused to grant a postponement to the junior pleader who was not ready. I think he was wrong not to hear the pleader who was willing to conduct the case. There appears to have been no reason to doubt the good faith of the request for the substitution of the pleader who was present for the one who was absent, and the absence of a vakalatnama was not to my mind a reason for proceeding *ex parte*. Under the

(1) (1901) I. L. R. 28 Calc. 532.

(2) (1861) S. D. A. Decisions, 144.

(3) (1882) I. L. R. 7 Calc. 295.

circumstances I think too he might well have granted an adjournment for the purpose of enabling the junior pleader to prepare himself to conduct the case, subject of course to any order he saw fit to make as to costs. The learned Judge bases his refusal to grant an adjournment on the fact that the case had been twice adjourned on the request of the present appellants' pleader. This is so ; but it had otherwise been adjourned 13 times in 11 months. The adjournments were no doubt unavoidable but must have been none the less a cause of loss to the appellant, and should have inclined him to a favourable reception of his application. As it was I consider that the Judge ought not to have shut out the appellant from being heard when all reasonable steps for his being heard had been taken, and the appeal must be allowed with costs here and in the Court below, and the original appeal must be reheard.

The Rule is discharged.

Mookerjee J.—The circumstances which have given rise to the proceedings now before this Court, are not the subject of controversy. The respondents commenced an action under section 24 of Act X of 1859, against the appellant, in the Court of the Deputy Collector of Cuttuck, for an account of sums collected by him as their agent. The claim was valued at above Rs. 100 and was dismissed by the Court of first instance. The plaintiffs preferred an appeal to the District Judge of Cuttuck under section 160 of Act X of 1859. The appeal was heard *ex parte* and decreed on the 12th March 1906. On the 6th April following, the appellant made an application to the District Judge to set aside the *ex parte* judgment and to re-hear the appeal. This application was dismissed on the 10th September 1906 on the ground that there had been laches on the part of the appellant and that the evidence did not establish that he was prevented by sufficient cause from appearing when the appeal was called on for hearing. The present appeal has been filed against this order of the District Judge.

A preliminary objection is taken to the hearing of the appeal on the ground that the order in question is not appealable and it is further suggested that the District Judge had no jurisdiction to entertain the application for revival. It is argued that Act X of 1859 is a Code complete in itself and that the appellant is not entitled to the benefit of the provisions of section 560 of the Code of Civil Procedure. In support of this position, reliance is placed upon the cases of *Doyal Chandra v.*

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Dwarka Nath (1) *Nagendra Nath v. Mathura Mohan* (2), *Radhamadhub v. Lukhi Narain* (3) and *Mokunda Bullav Kar v. Bhogaban Chunder* (4). In answer to this argument, it is contended on behalf of the appellant that if these cases lay down broadly and without any qualification the principle that Act X of 1859 is a Code complete in itself in the sense that no provisions of the Code of Civil Procedure are applicable to proceedings under that Act, they are inconsistent with the decision of their Lordships of the Judicial Committee in *Nilmoni Singh v. Taranath* (5); and it is further contended that in any view of the matter, section 560 is applicable by reason of the provisions of section 161 of Act X of 1859. In my opinion, the second branch of the contention of the appellant is manifestly well-founded and must prevail. As already stated, the appeal in the present instance lay from the Deputy Collector to the District Judge under section 160 of Act X of 1859. Section 161 provides rules regarding presentation and hearing of such an appeal and is to the following effect:—"The petition of appeal shall be written on the stamp paper prescribed for appeals from the Subordinate Civil Courts with reference to the amount of value of the property involved in the appeal; and the rules in force in regard to the time within which appeals from the decisions of such Courts may be received, and to the manner in which such appeals are heard and determined, and to all proceedings which may be had in respect of such appeals, shall be applicable to appeals to the Zillah Judge or High Court under this Act." It is obvious, therefore, that if the appeal preferred to the District Judge, is to be heard and determined in the manner in which appeals from the Subordinate Civil Courts are heard and determined, section 556 of the Code of Civil Procedure is applicable, and under the second paragraph of that section, if the appellant attends and the respondent does not attend, the appeal shall be heard *ex parte* in his absence. It is further plain that if all proceedings which may be had in respect of appeals from the Subordinate Civil Courts may also be had in respect of an appeal preferred from a decision of the Deputy Collector to the District Judge, section 560 of the Code of Civil Procedure is applicable; and if that section is applicable, the order made by the District Judge, if it is one of refusal to re-hear the appeal, is itself appealable to this Court under section 588, clause 27 of the Code of

(1) (1862) Marshall 148.

(2) (1891) I. L. R. 18 Calc. 368.

(3) (1893) I. L. R. 21 Calc. 428.

(4) (1894) I. L. R. 21 Calc. 514.

(5) (1882) L. R. 9 I. A. 174; I. L. R. 9 Calc. 295.

Civil Procedure. The view I take of the scope and effect of section 161 of Act X of 1859 is amply borne out by the decision of a Full Bench of the Sudder Court in *Haladher Biswas v. Mahes Chandra Halder* (1) and by the decision of this Court in *Sadi Naik v. Serai Naik* (2). As pointed out in the earlier case, the language of section 161 shows that the Legislature intended that appeals under section 160 should be treated in every respect as Regular appeals in the Zillah or Sudder Courts, as the case may be, and that Act X of 1859 having given the right of appeal to these Courts, intended to leave the Courts to deal with the appeals according to their own forms and mode of procedure and to place no sort of restriction upon the action of the laws by which the decisions of these Courts are ordinarily governed. If this view of the scope of section 161 is well-founded, as I think it plainly is, there can be no possible controversy as to the applicability of sections 556 and 560 of the Code of Civil Procedure. In this view of the matter, it is unnecessary to deal at length with the first branch of the contention of the appellant which raises the question, whether the proposition that Act X of 1859 is a complete Code in the sense that no provision of the Code of Civil Procedure is applicable to proceedings thereunder, may not require to be qualified in view of the decision of the Judicial Committee in *Nilmoni Singh v. Tara Nath* (3).

As regards the merits of the present appeal, there can, I think, be no reasonable doubt that the appellant is entitled to succeed. It appears that the appeal was preferred on the 29th April 1905 and was not heard till the 8th March 1906. Various dates for hearing were fixed from time to time and there appear to have been sixteen intermediate adjournments, twelve of which were made to suit the convenience of the Court, two for the convenience of the appellant and two for the benefit of the respondents. It appears that the present appellant who was the respondent in the appeal before the Judge, originally entered appearance through a pleader Babu G. C. Roy. Later on, he engaged a senior pleader, Babu Gokulanundo Chowdhury to argue the case. When the appeal was called on for hearing, it was represented to the Court that Babu Gokulanundo could not attend on account of illness and that he had transferred his brief to another pleader, Babu Pitbas Patnaik who appeared and offered to argue the case on behalf of the respondent. The Judge

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(1) (1861) Bengal Sudder Decision, Vol. I p. 144.

(2) (1901) I. L. R. 28 Calc. 532.

(3) (1892) I. L. R. 9 Calc. 295.

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declined to hear him as his name did not appear on the vakalat-namah. The pleader through whom the respondent had originally entered appearance stated that he had no instructions to argue the appeal, but if the case was adjourned for a day he would be ready. The Judge declined to adjourn the case and the result was that the appeal was heard *ex parte* and the judgment of the Court of first instance was reversed. In my opinion, the course which was adopted by the Court was not in the interests of justice and that either the pleader who offered to argue the case should have been heard or an adjournment ought to have been granted to enable the respondent to be properly represented. Under the circumstances stated, the appellant would have been amply protected if the learned Judge had made a suitable order for costs in his favour. In my opinion, it is not at all desirable that cases should be disposed of in this manner without hearing one of the parties when it is manifest that he and his legal advisers had *bona fide* made every effort to be represented before the Court.

The appeal, therefore, must be allowed and the order of the Court below discharged; the *ex parte* decree made on the 12th March 1906 is set aside and the appeal before the District Judge will be reheard after reasonable opportunity has been given to the present appellant to be represented at the hearing. The appellant is entitled to his costs in this Court as well as in the Court below.

N. K. B.

Appeal allowed.

Before Mr. Justice Brett and Mr. Justice Chitty.
 ABDUS SUBHAN *alias* MEHRAL AND OTHERS

v.
 KURBAN ALI AND OTHERS*
 AND
 UMAR KARIM AND OTHERS

v.
 HEDAITULLAH AND OTHERS.*

CIVIL.

1908.

January, 13.

*Wahabis, right of worship in mosques built by Hanafis—Declaration, suit for—
 Court's power to grant declaration subject to condition.*

The Wahabis, although holding different views in the matter of ritual, have a right to worship in the mosques, built by Mussalmans of the Hanafi sect primarily for the use of their own sect, provided in the exercise of the right of worship they do not interrupt or disturb the worship of others.

The granting of declaratory relief is discretionary with the Court. It can make a declaration in such a form as will grant the relief claimed and provide against an abuse of the right accorded.

Appeals by the defendants 1, 4, 6, 7 and 8.

Suits to establish the plaintiffs' right to say prayers and perform other religious rites in mosques.

The facts and arguments appear sufficiently from judgment.

Moulvis Syed Shamsul Huda and Mahommed Ishfak for the Appellants.

Moulvis Mahammad Yusoof and Abdul Jawad and Babu Biraj Mohun Mojumdar for the Respondents.

The judgment of the Court was as follows :

These are two appeals from decrees of the District Judge of Patna reversing (except as to the defendant Abdul Karim) decrees of the Munsiff of Patna and granting the plaintiffs the reliefs claimed by them in their respective complaints but declaring that in the exercise of their rights the plaintiffs are subject to the general law of the land. The suits were brought to establish the plaintiffs' rights to say their prayers and perform other religious duties in two mosques, one in Mohalla Mohomedpur, Shahganj and the other in Mohalla Baksariatola Chowki Sultanganj Patna, and further to restrain the defendants from interfering with such rights. The questions at issue are common to both suits, and were disposed of both in the Court of first instance and the lower

* Appeals from Appellate Decrees Nos. 201 and 318 of 1906, against the decrees of T. W. Richardson, Esq., District Judge of Patna, dated the 31st October 1906, reversing those of Babu Joy Prosad Pande, Munsiff of Patna, dated the 27th May 1906.

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appellate Court in one judgment. The same course may be conveniently followed with regard to these two appeals. The appellants before us are defendants 1, 4, 6, 7 and 8 and the active respondents are the plaintiffs. A number of issues were raised in the Court of first instance relating to limitation, procedure, joinder of parties and so forth. These were decided in the plaintiffs' favour. The lower appellate Court declined to consider them on the ground that they were not made the subject of a cross-appeal. They have been again put forward in the grounds of appeal before us, but no argument has been addressed to us in respect of them. The sole question laid before us has been as to the right of the plaintiffs to worship at these mosques and that is the only point for our determination. The findings of fact which we must accept are shortly these:—The mosques in question appear to have been built by Mussulmans of the Hanafi sect primarily for the use of members of their own sect. They have been used by Hanafis and as a general rule by Hanafis only. The lower appellate Court has declined to find that either or both the mosques were expressly reserved for the use of the Hanafis. Such an inference could not properly be drawn from the evidence on the record. It might also be questioned whether such a special dedication would be in accordance with Mohamedan ecclesiastical law. The plaintiffs and defendant all belong to the Sunni sect of Mussalmans. The plaintiff, however, belong to a School known as *Amil-bil-hadis* or as their opponents style them Wahabis and are regarded as an orthodox by the general body of Hanafis to which the defendants belong. The difference between them is not so much (if at all) in matters of belief as of ritual. The *Amil-bil-hadis* employ the loud toned 'Amin' and the raising of hands (*rufa yudain*) while the others pronounce the 'Amin' in a low tone and do not raise the hands above the knee. These points of ritual though seemingly unimportant in themselves have led to much difference of opinion among Mussalmans and consequent litigation. The earliest reported case was a Criminal one, *Queen Empress v. Ramzan* (1). In that case Mahmood J., expressed an opinion that the accused was at liberty to say 'Amin' in a loud tone and was justified in entering the mosque and worshipping with the congregation even though he used the loud toned 'Amin'. The question in that case was whether there had been an offence under section 296, Indian Penal Code, and the majority of the Full

(1) (1885) I. L. R. 7 All. 461.

Bench concurred in remanding the case for further enquiry as to the facts.

The question came again before the Allahabad High Court in the case of *Ataullah v. Azimullah* (1). There the Full Bench held that members of the Wahabi sect (as are the plaintiffs here) were Mohamedans and as such entitled to perform their devotions in a mosque, though they might differ from the majority of sunnis on certain points. Those points were the same as are in issue in this case. The learned Chief Justice there expressed an opinion that a Mahomedan would bring himself within the grasp of the criminal law who, not in the *bonafide* performance of his devotions but *malafide* for the purpose of disturbing others engaged in their devotions, made any demonstration oral or otherwise in a mosque and disturbance was the result.

Lastly, in an appeal from this Court in the case of *Fazl Karim v. Moula Baksh* (2) their Lordships of the Privy Council upheld the right of an Imam to officiate in a mosque even though he belonged to the *Amil-bil-hadis* or Wahabis and adopted the loud toned 'Amin' and the raising of hands (*rufa yudain*).

It appears clear from these decisions that the plaintiffs have the right to worship in the mosques in question, and that they cannot be debarred from the exercise of such right on the ground of their views in the matter of ritual. This was not seriously contested by the appellants. What they chiefly desire is that some restriction should be placed upon the plaintiffs by the Court in declaring their right so as to prevent, so far as may be possible, a breach of the peace or unseemly disturbance in the mosques. This appears to us reasonable. The granting of declaratory relief is discretionary with the Court and there seems no reason why it should not make the declaration in such a form as will grant the relief claimed and yet provide against an abuse of the right accorded. The learned District Judge has taken this view but we think that his declaration that "in the exercise of their rights the plaintiffs are subject to the general law of the land" is too vague to be of much practical assistance to the appellants. We think that if the declaration in favour of the plaintiffs be accompanied by the proviso that the plaintiff, in the exercise of their rights of worship do not interrupt or disturb the worship of others, it will meet the requirements of the case. We may say that we entirely agree with the dictum of the

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(1) (1889) I. L. R. 12 All. 494. (2) (1891) I. L. R. 18 Cal. 406.

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learned Chief Justice of Allahabad to which we have above referred. With this modification, the decrees of the lower appellate Court will be confirmed. We think that each party should bear his own costs of these appeals.

A. T. M.

Decree varied.

Before Mr. Justice Hill and Mr. Justice Rampini.

JAGARNATH MARWARI AND OTHERS

v.

KARTICK NATH PANDEY.*

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 1900.
 February, 14.
 March, 14.

Appeal—Order refusing to grant a sale certificate—Civil Procedure Code (Act XIV of 1882), Section 244—Decree-holder, auction-purchaser—Party—Execution, relating to.

No appeal lies against an order refusing to grant a certificate of sale to the decree-holder, auction-purchaser, the question determined being not one relating to the execution, discharge or satisfaction of the decree.

Bhimal Das v. Must. Ganesha (1) applied.

The auction-purchaser being also decree-holder is a party to the suit within the meaning of section 244 of the Civil Procedure Code.

Ghulam Shabbir v. Dwarka Prasad (2) not followed.

Modhu Sudan v. Gocinda Pria (3) followed.

Appeal by the Auction-purchaser.

Application for issue of a certificate of sale.

The facts of the case appear sufficiently from the judgment.

Dr. Ashutosh Mookerjee and Babu Ashutosh Mukerjee for the Appellants.

Babus Dwarka Nath Chuckerbutty and Joy Gopal Ghosha for the Respondent.

C. A. V.

The judgment of the Court was as follows :

March, 14.

The facts of this case are as follows : In the suit of *Hardeo Das and others v. Kartick Nath Pandey* and others in the Court of the Subordinate Judge of Bhagalpore a decree was passed in favour of the plaintiffs on the 26th February 1880. In execution of that decree certain immoveable property belonging to the judgment-debtors was attached and advertised for sale. On the 7th September 1885, permission to bid and purchase at the sale was granted to the decree-holders collectively, and on the same day the sale was held, Hardeo Das

* Appeal from Original Order No. 433 of 1898 with Civil Rule No. 1889 of 1899, against the order of Babu Nuffer Chunder Bhutto, First Subordinate Judge of Bhagalpur, dated the 17th August 1898.

(1) (1897) 1 C. W. N. 658

(2) (1895) I. L. R. 18 All. 36.

(3) (1899) I. L. R. 27 Calc. 34.

alone of the decree-holders, bidding at the sale and being declared the purchaser. The purchase-money was set off against the amounts due under the decree which was thereby satisfied. The sale was confirmed on the 23rd March 1886. On the 4th May 1888 Hardeo Das applied for a certificate of sale in his own name. His application was however opposed by certain of his co-decree-holders on the ground that the purchase had been made on their behalf as well as on that of Hardeo Das and that the latter was, therefore, not entitled to a certificate in his name alone. Effect was given to this objection by an order of the Court of the 30th July 1888 by which it was directed that the certificate should issue "in the names of all the decree-holders." Nothing however was done in pursuance of this order and in November 1890, Hardeo Das died. On the 23rd March 1898, the sons and grandson of Hardeo Das petitioned the Court as his heirs for the issue of a certificate of sale in their favour in respect of the properties sold on the 7th September 1885. This petition was, by an order of the 13th June 1898, granted but on the 22nd June, the judgment-debtors, Kartick Nath Pandey by leave of the Court filed objections to the issue of the certificate. It is unnecessary to refer more particularly to these objections, but on a reconsideration of the matter the Court on the 17th August 1891 set aside its order of the 13th June and dismissed the petition of the heirs of Hardeo Das. From the latter order the heirs of Hardeo Das preferred the present appeal to this Court, and afterwards a doubt having arisen as to the competency of the appeal, applied to the Court under section 622 of the Code of Civil Procedure for revision of the order dismissing their petition and a Rule was accordingly issued.

We have before us now both the appeal and the Rule and to both a preliminary objection has been raised on behalf of the judgment-debtor, it being contended firstly that an appeal will not lie against an order refusing to grant a certificate of sale : and then that the case does not fall within the purview of section 622 of the Code of Civil Procedure.

In our opinion both these objections are well-founded. With respect to the appeal, section 588 of the Code does not give an appeal against an order made under section 316 and consequently the present appeal will not lie unless the order complained of determined a question arising between the parties to the suit or their representatives and relating to the execution, discharge or satisfaction of the decree, so as to bring the matter within the

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scope of section 244 of the Code. The circumstance that the decree-holder in the present case was also the auction-purchaser was not, we think, sufficient to deprive him of his status as a party to the suit, though a different view has been taken by the Allahabad Court in the case of *Ghulam Shabbir v. Dwarka Frosad* (1). But in *Bhimal Das v. Musst. Ganesha Koer* (2) where a cognate question arose, the learned Judges treated the fact that the judgment-creditor was himself the purchaser at auction as immaterial. The same view seems to have been taken in *Bhoope Roy v. Ram Kumar Pershad* (3) and it was expressly affirmed in *Madhusudan Das v. Govinda Pria Chowdhurain* (4). But it remains to be decided whether the question determined was one which related to the execution, discharge or satisfaction of the decree. On this question, we have not been referred to any decision precisely in point. The reasons however by which the learned Judges were guided in *Bhimal Das v. Musst. Ganesha Koer* (2) in coming to the conclusion that the question there determined did not relate to the execution, discharge or satisfaction of the decree seem to us to be equally applicable in the present case. They say "the question does not in our opinion relate to the execution, discharge or satisfaction of the decree: no order made on it can in any way affect the decree. The decree has already been executed with regard to the particular property and has been discharged or satisfied to the extent of the purchase-money paid therefor." In the present case likewise the decree has been satisfied long since and is now in all probability extinct and no order which the Court could have made on the petition of the heirs of Hardeo Das could have affected the decree or the execution, discharge or satisfaction of it. We are, therefore, of opinion that the case does not fall within section 244 of the Code, and that the appeal must consequently fail.

As to the Rule, we do not think that the case is one for the exercise of our powers of revision under section 622 of the Code.

We accordingly dismiss the appeal with costs which we assess at two gold mohurs, and discharge the Rule with costs which we assess at one gold mohur.

A. T. M.

Appeal dismissed ; Rule discharged.

(1) (1895) I. L. R. 18 All. 86.

(2) (1897) 1 C. W. N. 658.

(3) (1899) I. L. R. 26 Calc. 529.

(4) (1899) I. L. R. 27 Calc. 34.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice
and Mr. Justice Coxe.

KUMAR BANWARI MUKUNDA DEB

v.

BIDHU SUNDAR THAKUR AND OTHERS.*

CIVIL.

1908.

January, 22.

*Chaukidari Chakran lands—Possession, suit for—Zemindar and putnidar—
Resumption by Government and subsequent settlement with zemindar—
Frame of suit.*

Certain lands included in a *putni pottah*, having been *chaukidari chakran* lands, were resumed by Government and subsequently settled with the *zemindar*. The *putnidar* sued for possession of these lands :

Held, the suit was one for possession and not for specific performance of a contract and was maintainable, even if all the parties to the contract were not made parties to the suit.

Ranjit Singh v. Radha Charan Chandra (1) dissented from.

Kari Newaz Khodir v. Ram Jadu Dey (2) and *Hari Narain Mozumdar v. Mukund Lal Mundal* (3) approved.

Appeal by the Defendant.

Suit for possession.

The material facts and arguments appear from the judgment of Maclean C. J.

Dr. Rash Behary Ghose and *Babu Khetra Mohun Sen* for the Appellant.

Babus Nilmadhub Bose and *Hemendra Nath Sen* for the Respondents.

The following judgments were delivered :

Maclean C. J.—The only point argued on this appeal is whether the plaintiffs are entitled to recover judgment having regard to the frame of the suit. It appears that under a *pottah* dated 1823, the then *zemindar* granted to the predecessors in title of the plaintiffs a *putni* giving them possession of a certain *mouzah* including the *chakran* lands. It is clear upon the face of the *putni pottah*, specially having regard to section 41 of Regulation VIII of 1793, that at the time of the *putni* the *zemindar* was the owner of the *chakran* lands and that these lands are included in and covered by the *putni*. The *chakran* lands were subsequently transferred to the *zemindar* who

* Appeal from Appellate Decree No. 497 of 1906 against the decision of Babu Bepin Behary Chatterji, Subordinate Judge, Murshidabad, dated the 2nd December 1903, affirming that of Babu Ashutosh Banerji, Munsiff, Kandi, dated the 17th May 1904.

(1) (1907) I. L. R. 34 Calc. 564.

(2) (1906) I. L. R. 34 Calc. 109.

(3) (1900) 4 C. W. N. 814.

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took the transfer, subject to the provisions of section 51 of the Village Chowkidari Act (VI of 1870, B. C.) and the plaintiffs now bring the present suit to recover possession of these *chakran* lands. Plaintiffs 1 to 8 are entitled to an one-third share under the *putni*; plaintiff No. 9 to another third; and defendant No. 3 to the remaining third, and he, it appears, let out his interest in *durputni* to plaintiff No. 10 who is the same person as plaintiff No. 3, so that, we have before the Court all the persons who are interested in the *putni* and all the persons who are entitled to claim possession of the lands in question, as against the zemindar: in other words, every body interested in the *putni* is before the Court, either as plaintiff or as defendant, the suit being one for possession of the *chakran* lands. Then it is said that this is not a suit for possession but is a suit for specific performance of a contract, and being a suit for specific performance of a contract, the suit cannot successfully prevail, unless all the parties to the contract who seek to have it specifically performed are co-plaintiffs. The answer to that appears to be two-fold. I do not think this is an action for specific performance of a contract. This is an action for possession of the *chakran* lands which were included in the *putni* to which I have referred. There is no agreement to grant a *putni* of these lands when they were transferred to the zemindar, of which it is necessary to obtain a decree for specific performance. The *putni* is a concluded contract, and there is no agreement of which specific performance can now properly be granted. There is no doubt authority for the opposite view in the case of *Ranjit Singh v. Radha Charan Chandra* (1). But with great respect, I do not assent to the view expressed in that judgment which seems to me to be inconsistent with the previous judgments of one of the learned Judges who was a party to the later decision, namely in the case of *Kazi Newaz Khoda v. Ram Jadu Dey* (2), and also in the case of *Hari Narain Mozumdar v. Mukund Lal Mundal* (3). The two decisions, I have last mentioned, appear to me to be inconsistent with the view taken in the case reported in *Ranjit Singh v. Radha Charan* (1); I do not notice they were referred to in the judgment in that case. If then it is a suit merely for possession under the contract contained in the *putni*, I think

(1) (1907) I. L. R. 34 Calc. 564. (2) (1906) I. L. R. 34 Calc. 109.

(3) (1900) 4 C. W. N. 814.

the suit is properly framed : and, agreeing with both Courts, I think the plaintiffs are entitled to judgment.

As regards the other two points, the point as to whether the idol ought to have been made a party, and the question what rent should be paid for the resumed lands, as no argument has been addressed to us on those points and they have been abandoned, I need say nothing about them.

The appeal fails and must be dismissed with costs.

Coxe J.—I agree.

N. K. B.

Appeal dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Fletcher.

A. J. KING

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL.

High Court, Letters Patent, 1865, clause 12 ; whether an objection that no leave was taken under clause 12 can be waived—Letters Patent, 1865, clause 12—Registrar, power of, to grant leave under clause 12 of the Letters Patent.

The Registrar has no power to grant leave under clause 12 of the Letters Patent, 1865.

Laliteswar Singh v. Maharaja Sir Rameshwar Singh Bahadur (1) followed.

If the defendant is served and takes any step in the action except moving to set aside the service of writ on him he waives the objection of want of jurisdiction on the ground that no leave under clause 12 was properly obtained and cannot be heard.

Moore v. Gamgee (2) and *Jones v. James* (3) referred to.

Application by the defendant for the issue of a commission for the examination of certain witnesses. It appeared that plaintiff has instituted this suit after having obtained leave under clause 12 of the Letters Patent from the Registrar. Such leave however, ought to have been taken from a Judge. Before this application had been made, the defendant had already filed his written statement. The argument before the Court was as to whether or not the suit was validly pending in this Court having regard to the fact that the leave granted by the Registrar was *ultra vires*.

(1) (1907) 5 C. L. J. 405.

(2) (1890) 25 Q. B. D. 244.

(3) (1850) 19 L. J. (Q.B.) 257

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February, 4.

Mr. L. P. E. Pugh for the Plaintiff.*The Advocate-General (Hon'ble P. O'Kenealy)* with the
Standing Council (Mr. S. P. Sinha) for the Secretary of State
for India.

The judgment of the Court was as follows :

Fletcher J.—The present application comes before me in a
somewhat unusual manner.

This suit is brought by the plaintiff to recover damages for wrongful dismissal. The plaintiff in his plaint alleges that his cause of action arises in part in Calcutta and prays for leave under clause 12 of the Letters Patent to institute this suit. Leave to institute this suit was granted by the Master. The defendant duly filed his written statement and applied to the Court for a commission to examine certain witnesses. Upon this application coming on for hearing before Woodroffe J., he directed the matter to be set down for argument as to whether or not the suit is validly pending in this Court having regard to the fact that leave to institute the suit was obtained from the Master. Now it has been decided by a Special Bench in this Court in the case of *Laliteshwar Singh v. Maharaja Sir Rameshwar Sing Bahadur and others* (1) that the granting of leave under clause 12 of the Letters Patent being a judicial act cannot be delegated to the Registrar or Master and that the rules of the High Court in so far as they authorise the Registrar or Master to grant such leave are *ultra vires*.

But neither in that case nor in the present case, until I pointed out the question to counsel, was it argued whether the objection that the leave was granted by the Registrar or Master is one which can be waived. If the objection is one that cannot be waived, that matter is one of far-reaching consequences. It means that in every case where the suit has proceeded even to judgment, the defendant can turn round and say that the whole proceedings are a nullity. Fortunately in my opinion this is not the result. The case is, I think, covered by the authorities of *Moore v. Gamgee* (2), which though not referred to in the argument before me is not distinguishable from the present case. In that case there was an application by defendant for a prohibition directed to the Judge of the County Court of Surrey to prohibit the proceedings in an action by the plaintiff against the defendant in that Court.

(1) (1907) 5 C. L. J. 405.

(2) (1890) 25 Q. B. D. 244.

By the County Courts Act 1888 (51 and 52 Vic. c. 43) section 74, it is provided that "every action or matter may be commenced in the Court within the district of which the defendant or one of the defendants shall dwell or carry on his business at the time of commencing the action or matter or it may be commenced by leave of the Judge or Registrar in the Court within the district of which the defendant or one of the defendants dwell or carried on the business at any time within six calendar months next before the time of commencement or with the like leave in the Court in the district of which the cause of action or claim wholly or in part arose."

At the hearing of that action on the 2nd day, the solicitor for the defendant took the objection that the Court had no jurisdiction to entertain the action on the ground that the defendant did not dwell or carry on his business within the district of the Court at the time of the commencement of the action and no leave had been obtained to bring the action in that Court. The County Court Judge held that the defendant by appearing and contesting the action had waived the objection and proceeded with the hearing. The defendant accordingly applied to a Divisional Court of the Queen's Bench Division (Cave and A. L. Smith, JJ.) for a prohibition to prohibit the proceedings in that action. Now pausing here for a moment, it will be noticed that section 74 of the County Courts Act is very similar to clause 12 of the Letters Patent. Doubtless in cases under section 74 of the County Courts Act leave may be granted by the Judge or the Registrar whereas under clause 12 of the Letters Patent leave must be granted by a Judge. But in *Moore v. Gamgee* (1) no leave at all had been granted and there can be no distinction between the case where no leave at all has been granted and a case where leave had been granted by a person not authorised to grant leave.

The judgment of the Court in *Moore v. Gamgee* (1) refusing the application for a prohibition was delivered by Cave J. who in the course of his judgment made the following pertinent remarks :—"There are two senses in which it may be said there is no jurisdiction to entertain an action first where under no circumstances can the Court entertain the particular kind of action as in cases within section 56 of the Act that is libel, slander, seduction or breach of promise of marriage ; *secondly* there are the cases provided for by section 74 where under certain circum-

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(1) (1890) 25 Q. B. D. 244 at 246.

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stances leave can be given to bring an action which the Court could not otherwise entertain ; in these cases there is no want of jurisdiction over the subject matter of the action but leave is required in the particular case before the Court can entertain the action, and it is an objection which may be taken to the hearing of the action that the defendant does not dwell or carry on his business within the jurisdiction and leave has not been obtained." In the present case the plaint was issued and the case was heard and partly decided before the objection was taken. There is always some difficulty in drawing an analogy between proceedings in the High Court and proceedings in the County Court because the High Court has jurisdiction by the Common law whereas the jurisdiction of the County Court is entirely created by Statute, but there is some analogy between such a case as the present and a case in the High Court where it is sought to serve a writ on a defendant who is resident abroad. In such a case in the High Court if the defendant is served and takes any step in the action except moving to set aside the service he waives the objection of want of jurisdiction and cannot be heard ; but a conditional appearance may be entered which has not the effect of waiving the defendant's right to object to the jurisdiction. In my opinion the case is much the same in the County Court * * *. I think, therefore, that the objection of the Court may be waived by taking any step in the proceedings before applying to dismiss the action and this view is borne out by a case which was not cited in argument (*In re Jones v. James*) (1).

The remarks of the learned Judges in *Moore v. Gamgee* (2) appear to me to apply to a case where leave has been purported to be granted by some person other than a Judge, under clause 12 of the Letters Patent.

In such a case no leave within the meaning of clause 12 has been granted.

The present suit is one where there is no want of jurisdiction in this Court over the subject matter of the action but leave under clause 12 of the Letters Patent is required before the Court can entertain the suit.

The defendant in this suit ought to have known as a matter of law that there was a want of jurisdiction unless leave as provided by clause 12 of the Letters Patent had been granted. He has filed his written statement and applied for a commission to examine witnesses. By taking these steps the defendant has in my

(1) (1850) 19 L. J. (Q. B.) 257.

(2) (1890) 25 Q. B. D. 244 at 246.

opinion waived his objection to the jurisdiction. The application by the defendant for a commission to examine witnesses must be set down for argument on its merits.

S. C. R.

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APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

RAJA SHYAM CHANDRA MARDARAJ HARICHANDAN
RAJ NARAIN DAS AND OTHERS

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

*Land Acquisition Act—Fishery right—Land—What is to be acquired—
Reference bad—Court, duty of.*

Fishery rights are not land within the meaning of the Land Acquisition Act.

What is to be acquired in every case under the Act is the aggregate of rights in the land, and not merely some subsidiary right as fishery right.

It is the duty of the Civil Court to set aside proceedings of, and a reference by, the Collector, which are bad, being contrary to the provisions of the Act.

Babujan v. The Secretary of State for India (1) and Bibi Ladli Begam v. Bibi Raje Rabia (2) referred to.

Appeal by the Claimants.

Reference by the Collector for the purpose of determining the amount of compensation to be paid to the claimants of certain fishery rights on the foreshore off the Proof Range.

The facts and arguments appear sufficiently from the judgment.

Mr. Caspersz and Babus Joges Chunder Dey and Joy Gopal Ghosha for the Appellant.

Babu Ram Charan Mitra for the Respondent.

C. A. V.

The judgment of the Court was as follows :

Rampini J.—This is an appeal against a decree of Baboo Annoda Charan Sen, Land Acquisition Judge of Balasore, dated the 23rd February 1904. The decree was passed on a Reference made by the Land Acquisition Deputy Collector of Balasore under

March, 10.

* Appeal from Original Decree No. 297 of 1904, against the decree of Babu Annoda Charan Sen, Land Acquisition Judge of Balasore, District Cuttack, dated the 23rd February 1904.

(1) (1906) 4 C. L. J. 256 (258).

(2) (1888) I. L. R. 13 Bom. 650.

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section 18, Act I of 1894, for the purpose of determining the amount of compensation to be paid to the claimants of certain fishery rights on the foreshore off the Proof Range at Chandipore acquired by Government for a public purpose by Notification No. 1150 L. R., of the 3rd March 1903, published at page 292, Part I of the *Calcutta Gazette* of the 4th March 1903.

The fisheries are 11 in number.

The only question contested in the Court of first instance seems to have been the question of compensation. The Land Acquisition Judge allowed Rs. 1,565-1-3 for the fisheries in Taluk Majhibata, Rs. 4,463-2-0, for the fisheries in taluk Joydeb, and Rs. 881-12-8 for the fisheries in taluk Padmapur that is, sums considerably in excess of the compensation awarded by the Deputy Collector.

The claimants were not satisfied and appealed to this Court, complaining that certain evidence had been excluded by the first Court. This Court by its decree of the 2nd January 1907, allowed this contention and remanded the case to the first Court for the admission and recording of the evidence excluded.

The lower Court has admitted and recorded this evidence.

The whole appeal is now before us.

It appears to us that the proceedings of the first Court, as well as those of the Collector, are from beginning to end without jurisdiction.

The fishery rights taken up are described in the Reference by the Collector as follows: "The fishery rights contained within the boundaries of the lands, *as already acquired by Government*, for the Military Department at Chandipur, thus bounded:—

North—The remaining unacquired portion of the villages Srikona and Mirzapur.

South—The remaining unacquired portion of the village Joydeb Kasba.

East—Sea.

West—The remaining unacquired portions of the villages Srikona, Hidga, Guddu, Nidhipara and Joydeb Kasba."

Now, it appears that by a previous Declaration No. 777 L.R. of the 10th February 1896, published in the *Calcutta Gazette* of the 12th February 1896, Part I, page 187, the following lands were acquired:—"A piece of land measuring, more or less 909 mans 1 ghunt and 11 biswas of standard measurement. It is bounded on the north by the remaining portion of the village

of Chandipore and Roman Catholic Mission Bungalow, south by the remaining portion of village Barkia, east by the sea, and west by the remaining portions of the respective villages of Chandipur, Srikona, Hisgau, Ransahi, Gadu Joydeb kasba, Barkia and Nidhipura." Hence, the lands over which the fishery rights now acquired are exercised were acquired by Government in 1896. The fishery rights now to be acquired are in fact exercised over the foreshore off Chandipore in the Balasore District. The eastern boundary of the lands previously acquired was "the sea." In the reference of the Deputy Collector in these proceedings, the eastern boundary of the fisheries to be acquired is described as "the sea."

The first matter which strikes us in connection with, and which seems to be a fatal objection to, these proceedings is that the rights of fishery which have now been acquired were previously acquired by Government in 1896. The Government then took up the foreshore over which the fishery rights now to be acquired are exercised, and consequently acquired the foreshore and all rights existing in connection with it and exercised over it. The Government cannot, therefore, take them up again. The second objection to these proceedings is that the Government is now taking up fishery rights, that is, incorporeal rights without taking up the land over which they are exercised and which, as already pointed out, Government has already taken up, and which is its own property. Government cannot in our opinion do this under the Land Acquisition Act. Land is defined in the Act as including benefits arising out of land, etc. But land is not defined as meaning benefits arising out of land. Therefore, fishery rights are not land, and it is only land, including the rights arising out of it, but not the rights detached from the land, that can be acquired under the Act. The Government pleader calls our attention to the definition of "persons interested," in which it is said that "a person shall be deemed to be interested in land, if he is interested in an easement affecting the land." This is no doubt correct, but it does not follow that because a person interested in an easement affecting the land may be entitled to share in the compensation awarded for the land that an easement comes within the definition of land, and can be acquired under the Act detached from the land affected by it.

The Government pleader has further explained that after Government acquired the foreshore off Chandipore, it in 1897 leased the fishery rights in the sea, that flows over the foreshore

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to certain persons and for 30 years, and they have transferred or sublet their rights to others. Government now repents of its having done so. It now wishes to cancel its settlement of these fishery rights, and to give it a good title to them, and to save it the trouble and danger of dealing with the settlement holders and their transferees, it has adopted the plan of taking the fishery rights up under the Act.

In our opinion, though it is doubtless convenient to it to do so, Government cannot for the two reasons already assigned, adopt this course.

The Government pleader's next argument is that the parties interested have only contested the amount of compensation awarded. This is not so, for all the claimants in their written statements, plead that "by contesting the amount of compensation they are not in any way waiving their right of questioning the land acquisition proceedings in the Civil Court on the ground that these fisheries cannot be legally acquired under Act I of 1894." See pp. 8, 12, 16 and 20 of the Paper book. Again, in their memorandum of appeal to this Court, their second ground of appeal is :—"That the Court below should have held that the right to fishery in respect of the space between the high-water and low-water mark, being neither land nor profit arising out of land, the subject matter is beyond the scope of the Land Acquisition Act and it cannot thus be acquired." Mr. Caspersz too for the appellants contends that the proceedings of the Deputy Collector are without jurisdiction. He goes further ; for he asserts that the proceedings of 1896 are illegal and that Government could not then legally acquire under the Act, the foreshore off Chandipore. We need not enter into that question now. We are not at present concerned with the legality of the proceedings of 1896.

But even if the appellants had not raised this plea, we consider we would have been entitled of our own motion to enquire into the legality of the Collector's proceedings and of the Reference (see *Ladli Begum v. Raje Rabia* (1).

The Government pleader finally calls our attention to the case of *Babujan v. Secretary of State and the Chairman of Gaya Municipality* (2). In this case it has been said : "The matter being referred to the District Judge, at the instance of Babujan who claimed to be the proprietor of the land, the Judge held that the Collector had no jurisdiction to deal with the case as he had

(1) (1888) 1 L. R. 18 Bom. 650.

(2) (1906) 4 C. L. J., 256.

done, and that he could not, therefore, entertain the reference. He, however, did not stop there, but went on to hold, that the Act did not apply to a case in which the Collector claims the land, on behalf of the Government or the Municipality.

Mr. Forester was no doubt right in holding that the first proceedings and the Reference thereunder were bad, because what has to be acquired in every case under the Land Acquisition Act, is the aggregate of rights in the land, and not merely some subsidiary right, such as that of a tenant."

These passages are, we think, in favour of the views we have expressed. They show (1) that what is to be acquired in every case under the Act is the aggregate of rights in the land, and not merely some subsidiary right, as in this case, fishery rights : (2) that it is the duty of the Civil Court to set aside proceedings of, and a Reference by, the Collector, which are bad, being contrary to the provisions of the Act.

We accordingly decree this appeal. We set aside the proceedings of, and the Reference by, the Collector in this case. The appellants are entitled to all their costs in both Courts.

A. T. M.

Appeal decreed.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

UPENDRA CHANDRA SINGHA ROY

v.

MAHOMED FAIZ CHOWDHRY AND ON HIS

DEATH, HIS HEIR AND LEGAL REPRESENTATIVE

TAFAZZAL AHMED CHOWDHRY AND OTHERS.*

Partition, suit for—Party—Co-putnidar and not darputnidar necessary party.

A person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition, as against persons who hold interests of a superior grade,

In a suit for partition by *putnidars* against *darputnidars* under his *co-putnidars*, the *co-putnidars* must be made parties ; but a *darputnidar* is not a necessary party in a suit for partition, if his *putnidar* is made a party, and if such a *putnidar* does not wish to avoid the responsibility which attaches to a party in a partition suit, that is, to see that the partition is carried out in a fair and equitable manner.

Appeal by Defendants Nos. 1 and 36.

Suit for partition.

* Appeal from Original Decree No. 268 of 1906. against the decree of Babu Hari Lal Mukerji, Officiating Subordinate Judge, Second Court, Tippera, dated the 17th April 1906.

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—

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—

CIVIL.

1908.

Upendra Chandra
Singha Royr.
Mahomed Faiz
Chowdhry.

The facts of the case and arguments appear sufficiently from the judgment.

Babus Dwarka Nath Chuckerbutty and Akshoy Kumar Banerji for the Appellants.

Moulvi Zahadur Rahim Zahed (for Moulvi Syed Shamsul Huda) and Babus Harendra Narain Mitter, Dharendra Lal Kastgir and Girija Prasanna Roy Chowdhry for the Respondents.

C. A. V.

The judgment of the Court was as follows :

January, 21.

Mitra J.—Taluk Chak Basta, which at one time belonged to Dewan Durga Churn, consists of 48 villages. Some of these villages are held by *talukdars* without the intervention of intermediate holders ; some of the villages, however, are held, either wholly or in part, by *dar-talukdars*.

The plaintiff claims a share of 3 annas 6 gundas 2 karas 2 krants, the defendants Nos. 1, 2 and 3, who may shortly be described as the Singha Roy defendants, have a 4 annas share, and the remaining defendants hold the remaining share. Defendants Nos. 15, 16, 17, 18, 19, 20, 21 and 22 are described in the plaint as having a share of 2 annas 4 gundas 2 karas 1 krant ; but it was conceded in the lower Court that their share was 2 annas 5 gundas. The shares of the different parties are specified in Schedule A of the plaint ; but that Schedule must be read with the modification that the plaintiff has a share of 3 annas 6 gundas 2 karas 2 krants and the defendants Nos. 15 to 22 a share of 2 annas 5 gundas. There was no dispute in the lower Court as regards the shares of other co-talukdars, and now there is no dispute as to the different shares of the parties. The decree of the lower Court directed a partition and, though the decree did not specifically mention the shares of the parties which it should have done, no difficulty arises from such failure to insert the respective shares of the parties. In the decree which will be drawn up in this Court, the shares of the parties should be specified as given in the plaint with the amendments we have herein stated.

As regards the villages which are held either wholly or in part by *dar-talukdars*, the shares are different and the *dar-talukdars* are also different. One of the mouzahs is said to be held entirely by the *dar-talukdars* i. e., mouzah Gajbaria. It is also said that, in 4 of the mouzahs, the *dar-talukdars* have a $7\frac{1}{2}$ gundas share ; in 7 others, they have a 5 annas 6 gundas 2 karas 2 krants share ; in 9 mouzahs, they have a 4 annas share ; in one mouzah, they have a 6 annas and odd gundas share ; in another, they have

or 1 anna odd gundas share ; and in another they have a 3 annas and odd gundas share.

In the lower Court, a question was raised as to the necessity of making these dar-talukdars parties to the suit. All the talukdars were arrayed either as plaintiffs or as defendants. The dar-talukdars have an interest of the second grade or degree under the talukdars. That they have a right to see that the partition is completed in a proper manner, and that their interests are not unjustly dealt with, is undeniable, and, in fact, the lower Court has directed that they should have a right to watch the partition proceedings though that Court did not direct them to be made parties to the suit. After the preliminary decree was passed by the lower Court, a petition was presented by the dar-talukdars asking that they might be made parties to the suit. The first petitioner was Tafazzal Ahmed Chowdhury, son of Mahomed Faiz Chowdhury. During the pendency of the appeal, Mahomed Faiz Chowdhury who was the plaintiff died, and Tafazzal Ahmed Chowdhury is now the plaintiff, being his legal representative. Though the present plaintiff had asked in the lower Court, that he, with the other dar-talukdars, might be made parties, he does not press the point in this Court : he has apparently, taken the same position as his father took during the course of the suit. Most of the talukdars did not contest the preliminary decree of the lower Court and do not ask this Court to add the dar-talukdars as parties. The only defendant who has preferred this appeal and asked this Court to direct that the dar-talukdars be made parties is the defendant No. 1 Upendra Chundra Singha Roy who is now the common manager of the estate. It would not affect his present interest, if the taluk continued to be joint as before.

But apart from any considerations as to the personal interest of one or other of the parties, the question of law that we have to decide is whether, in a suit for partition, the persons representing interests of an inferior grade or degree should be made parties along with the co-owners of a superior rank. The lower Court came to the conclusion that persons in an inferior situation, whether they had permanent interests or not, were not necessary parties in a partition suit. The learned vakil for the appellant has not denied the correctness of the proposition as a proposition of law, namely, that they are not necessary parties and that no suit should fail on account of the absence of such persons as parties to the suit. But what he has pressed upon

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us is this that, notwithstanding that they are not necessary parties, they are proper parties and that, in view of the facts of the present case, they should be made parties to the suit, and that the case should be sent back to the lower Court for that purpose.

There can be no doubt upon the authorities that, in a suit for partition, persons holding interests of an inferior degree are not necessary parties. It can, also, be stated that the authorities are clear that a person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition, as against persons who hold interests of a superior grade. In *Hemadri Nath Khan v. Ramani Kanta Roy* (1) the learned Judges came to this conclusion, and the decisions of this Court in *Radha-kanta Shaha v. Bipro Das Roy* (2) and *Nawab Dildar Ali Khan v. Bhowani Sakai Singh* (3) also, support the same view. So that if a putnidar who has a dar-patnidar under him declines to bring a suit for partition against his co-patnidars, the dar-patnidar, as representing the interest of such patnidar may bring a suit for partition against the co-patnidars of his own patnidar. Similarly, a patnidar may bring a suit for partition against his co-patnidars, and he may also bring a suit for partition, against dar-putnidars under his co-patnidars. But, in the latter case, the co-patnidars must be made parties. We are not, however, prepared to lay down, as a broad rule of law, that, in each case, a dar-putnidar is a necessary party defendant in a suit for partition, if his patnidar is made a party and if such patnidar does not wish to avoid the responsibility which attaches to a party in a partition suit, that is, to see that the partition is carried out in a fair and equitable manner. We are, accordingly, of opinion that the view of law taken by the lower Court is correct.

In the present case if we were to direct the dar-talukdars to be made parties, the suit would become highly complicated, and a large number of persons would be brought in as parties who might not be usefully or conveniently placed on the record as defendants. Their interests are not co-ordinate with the interests of the present plaintiff and defendants, and they may and ought to be fully represented in the suit by the persons under whom they claim subordinate or *dar-taluki* interests. We do not apprehend any difficulty in future from the partition being effected as directed by the lower Court. The presence of the dar-talukdars

(1) (1897) I. L. R. 24 Calc. 575 (583).

(2) (1904) 1 C. L. J. 40.

(3) (1897) 5 O. L. J. 643.

in the partition proceedings which will enable them to watch their own interests, will prevent any fraud from being practised, so far as their interests are concerned. If the dar-talukdars are made parties they may claim partition of their own shares *inter se* in each *dar-taluk*, and thus introduce almost interminable complications in the partition proceedings, (see the observations at page 211 of the judgment in *Fajneswar Dutt v. Bhuban Mohan Mitra* (1).

It is, however, desirable that, where an entire village is held by dar-talukdars that village should not be allotted to any particular share holder but should in accordance with the rule under the Bengal Estates Partition Act, be held by all the co-sharers jointly. As regards the villages in which the dar-talukdars hold a share or shares, the partition should, if possible, be effected in such a way as to give to the dar-talukdars their proportionate shares of the land in accordance with the shares held by them as *dar-talukdars*. This will obviate any difficulty as regards the distribution of assets. As regards the villages in which there are no dar-talukdars, they should be partitioned in the ordinary way and the shares should be as compact as practicable, and if possible, each set of sharers should get entire villages. But as regards the villages, held by dar-talukdars, a different rule must be adopted as we have indicated. The decree of this Court will specify the shares of the parties, direct that the dar-talukdars may be allowed to watch the proceedings, and it should further direct that the partition of the villages in which there are no dar-talukdars should be effected in the manner indicated above, whereas the partition of the villages in which there are *dar-talukdars* should be effected in a different way, each village being taken as a distinct property subject to partition amongst all the co-sharers. With these modifications, we affirm the decree of the lower Court, and dismiss this appeal with costs to the plaintiff respondent. We assess the hearing fee at Rs. 300.

A. T. M.

Appeal dismissed.

(1) (1906) 3 C. L. J. 205.

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PRIVY COUNCIL.

PRESENT :—*Lord Robertson, Lord Collins and Sir Arthur Wilson.*

GURU PRASANNA LAHIRI AND OTHERS

v.

JOTINDRA MOHUN LAHIRI.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT
FORT WILLIAM IN BENGAL.]

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December, 2.

Mesne profits, decree for—Satisfaction—Apportionment—Contribution.

When a decree for mesne profits was satisfied by some out of the entire body of persons liable thereunder by payments made from time to time, and a question arose as to the principle which would regulate contribution amongst the parties themselves. :

Held, that the correct principle was to allow interest on the sums paid from the date of payment, and then to apportion rateably the whole sum crediting interest on each amount paid in favour of the party on whose behalf it was paid, from the date of payment until the final satisfaction of the decree for mesne profits.

Judgment of the Judicial Committee in *Jotindra Mohan Lahiri v. Gurus Prosonno Lahiri* (1) explained.

Appeal by the defendants against a judgment of the Calcutta High Court (Brett and Mookerjee JJ.), dated the 29th August 1904.

Suit for contribution of sums paid in satisfaction of a decree for mesne profits.

The facts sufficiently appear from the judgment of the High Court which was as follows :

"This appeal has been remitted to this Court by their Lordships of the Privy Council with the following order :—

The High Court is hereby directed to take the account between the parties on the principle of computing interest on the total principal of the judgment-debt to the date of final extinguishment without regard to the sums from time to time paid on account and then crediting interest at the same rate on each amount paid in favour of the party on whose behalf it was paid from the date of payment to the date of final satisfaction of the decree.

The original judgment-debt as it appears from the decree was Rs. 85,795 with interest thereon at 6 per cent. per annum from the 12th May, 1879 till realization. The order passed on

the 3rd April 1882 merely amended a clerical error in the decree and did not in any way affect the provisions as to interest.

Interest calculated at 6 per cent. per annum on the debt from the 12th May 1879 up to the 17th September 1889, that is to say, for 10 years 4 months and 5 days, amounts to Rs. 53,264. This added to the principal gives a total of Rs. 1,39,059.

We have now to credit interest at the same rate on each amount paid in favour of the party on whose behalf it was paid from the date of payment until the final satisfaction of the decree on the 17th September 1889. We have made these calculations and the results are shown in the Schedule attached to the decree. These show that the plaintiff is entitled to credit for the sum of Rs. 51,295, the defendant No. 1 entitled to credit for Rs. 62,010, defendant No. 2 to credit for Rs. 23,596 and Kanaktara's share to credit for Rs. 11,973. This last mentioned sum must be divided into two equal shares, one of which will be credited to the plaintiff and the other to the defendant No. 1. The half share is Rs. 5,986. The effect of these transfers is that the amount for which plaintiff is entitled to credit is increased to Rs. 57,281, and the amount for which defendant No. 1 is entitled to credit is increased to Rs. 67,996.

These three sums standing to the credit of plaintiff, defendant No. 1 and defendant No. 2 respectively added together give a total of Rs. 1,48,873.

This sum it is to be observed differs substantially from the sum arrived at under the directions of their Lordships by adding interest to the original judgment-debt from the date of decree up to the date of realization. This amount has already been shown to be Rs. 1,39,059.

These two sums again differ from the amount which was actually paid into Court in satisfaction of the judgment-debt. This sum is arrived at by adding together all the payments made by the different parties in satisfaction of the decree, and amounts to Rs. 1,25,866.

The difficulty now presents itself of following the further instructions of their Lordships and taking an account on this footing. In order to prepare any account, it is first necessary to remove the discrepancy between the total sum arrived at by adding the total interest to the judgment-debt and that arrived at by adding to each payment interest at the same rate from the date thereof up to date of final satisfaction of the decree, otherwise it is impossible to prepare any account. The most equitable method

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of removing the discrepancy would appear to be to debit to the different parties sums out of the excess of the latter over the former in proportion to their respective shares in the estate. The difference is Rs. 9,814 and the proportionate share debitable to the plaintiff is Rs. 3,159, that debitable to the defendant No. 1, Rs. 4,692 and that debitable to defendant No. 2 is Rs. 1,963. The result of these deductions is that the amount standing to the credit of the plaintiff is reduced to Rs. 54,122 ; that to the credit of defendant No. 1 to Rs. 63,304 and that to the credit of defendant No. 2 to Rs. 21,633.

Out of the total liability of Rs. 1,39,059 the plaintiff's share is Rs. 33,896, defendant No. 1's share is Rs. 55,624, defendant No. 2's share is Rs. 27,811 and Kanaktara's share Rs. 21,728. This last must be divided into two equal halves of Rs. 10,864 each, and each half transferred to the shares of the plaintiff and defendant No. 1, respectively. The result is, the plaintiff's liability is Rs. 44,760, the liability of defendant No. 1, is Rs. 66,488, and defendant No. 2's liability is Rs. 27,811.

If the amounts as determined above as standing to the credit of each of the parties be set off against these sums, it will be found, that the plaintiff has made an excess payment of Rs. 9,362, the amount standing to the credit of defendant No. 1 falls short of his liability by Rs. 3,184, and the amount to the credit of defendant No. 2 falls short of his liability by Rs. 6,178.

The plaintiff will, therefore, be entitled to a decree for Rs. 3,184 against defendant No. 1 and for Rs. 6,178 against defendant No. 2.

The plaintiff will also recover interest on these sums from the defendants at 6 per cent. per annum from the date of suit up to the date of realization.

Plaintiff will also recover costs in this and the lower Court from each of the defendants in proportion to the amounts decreed against them.

The judgment of the Judicial Committee was delivered by

Lord Collins.—The history of this long and complicated litigation, which has now, it is to be hoped, reached its ultimate stage, is compendiously stated in the judgment of this Board delivered by Sir Arthur Wilson on 23rd March 1904, which is appended to this case, and only a very brief statement is necessary to make the particular point that now arises for discussion intelligible.

In 1882 the parties to this appeal had become liable jointly

for the payment of a sum which had been decreed to be paid by them for mesne profits of a certain share in an estate, of which share they had for many years been in wrongful possession. The amount for which the decree was made was finally ascertained on 23rd April 1882 as Rs. 85,795, upon which sum interest at six per cent. from the 12th May 1897 was payable until realization. The shares in the estate of the parties to this action were liable to be seized in execution under the decree. The liability under this decree was finally extinguished by payments made at different times by the various parties to this suit extending down to 17th September 1889, during all which time interest was running on so much of the decreed amount as for the time being remained unsatisfied.

After the liability to the decree-holders had been thus satisfied, a dispute which has led to much litigation arose between the contributors as to their reciprocal rights and obligations towards each other, having regard to the amounts of their several contributions, the times at which they had been made, and the different proportions of their interests in the other shares in the estate itself. This litigation was carried up to the High Court at Calcutta. and from thence to this Board, who remitted it to the High Court with directions as to certain accounts to be taken and the consequent relief to be given. The High Court accordingly took accounts and made a decree finding a certain balance payable to the plaintiff, the now respondent. Against that decree the other parties or their representatives, by leave of the High Court, now appeal. They take exception to two mistakes, as they allege, of fact :—

(a) That the account has been taken and interest calculated from too early a date, *viz.*, from the 12th May 1879 instead of from the 3rd April 1882.

(b) That a sum of Rs. 740 should not have been credited to the respondent.

Their Lordships are of opinion that both these objections, which go to fact only and not to principle, fail, for the reasons given by the respondent. The appellants further contended that the Court below have not correctly followed out the directions of this Board in the manner in which they have adjusted the shares and obligations of the parties *inter se* upon the accounts so taken. As pointed out in Sir Arthur Wilson's judgment, the inequality which it was sought to remedy by the accounts directed was that which arose by reason of the fact

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that the payments which stopped *protanto* the running of interest on the decretal amount operated for the benefit of those who had not paid them as well as of those who had. The provision that, in taking the account interest should be allowed on the sums paid from the date of payment, adjusted *inter se* the inequality thus arising between the contributors, and from an account so taken it was possible to assess the exact proportion which each contributor had in fact borne in discharging the common burden. This being ascertained, the amount in fact contributed had to be compared with the share of the common obligation properly falling to him in virtue of his proportionate interest in the estate. The shares in the estate of each of the contributors were not in controversy, and the only figure open to discussion would now be what ought to be taken as the figure representing the total debt to be discharged, for this is what had to be distributed among the contributors and borne by them in proportion to their interests. Three different figures have been suggested in the discussion :—

(1) That which represents the actual sum which was received by the decree-holder in satisfaction of his decree, *viz.*, Rs. 125,826.

(2) The sum arrived at under the order of the Privy Council, on the footing that the principal and interest had all been paid on the same day, *viz.*, the 17th September 1889, which amounted to Rs. 139,059.

(3) The sum arrived at as the result of the other account directed by the Privy Council, *viz.*, "crediting interest at the same rate on each amount paid in favour of the party on whose behalf it was paid from the date of payment until the final satisfaction of the decree, *viz.*, Rs. 148,873.

Of these figures the first, though it shows the total sum actually received by the decree-holder, ignores the relative positions of the contributors towards each other in view of the fact that the debt was wiped out at the times and in the amounts of the several contributions from time to time made by the debtors ; it does not translate into figures the separate and aggregate cost to the contributors at which the debt was wiped out. The second represents only a notional state of facts, and cannot be taken as affording a true total for division according to interests.

It seems to their Lordships that the third figure is that which should be taken as representing between the parties the whole burden which is to be divided among them in proportion to their

several interests in the property. The burden to be borne was made heavier to all by reason of the length of time over which the liquidation was protracted, while the rights of individuals are equalised by the allowance of interest on their contributions from the time they were made.

Thus we have in this figure the total aggregate cost at which *inter se* the common debt was liquidated, and this, therefore, is the burden to be assumed among them in properly adjusted shares.

In their Lordships' opinion, therefore, the account should be taken on this footing, and the amounts of their several contributions already ascertained set off against their several liabilities so adjusted. This is in effect what has been done by the learned Judges below, though they have arrived at their result by a somewhat longer process.

Having first in the prescribed method ascertained the amounts contributed by each party to the liquidation, they have in the first instance measured each contributor's share of the burden by treating it as an aliquot part of the second of the above figures, *viz.*, Rs. 139,059. They have then ascertained the difference between that figure and No. 3, *viz.*, Rs. 148,873 at Rs. 9,814, and having divided this sum in proper proportions, have added an aliquot part to the burden falling upon each contributor under the former calculation.

Having thus ascertained the share of the burden and the amount contributed by each, they have decreed the consequential relief.

Their Lordships will, therefore, humbly advise His Majesty that the decree of the High Court should be affirmed.

The appellants will pay the costs of this appeal.

Appeal dismissed.

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Lord Collins.

Before Mr. Justice Mookerjee and Mr. Justice Holmwood.

BANDHU ACHARJA AND OTHERS.

v.

NATHNI BAHAR SINGH.*

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1907.

January, 23,
March, 25,
April, 17.

Tanki-tenure—Revenue sale—(Act VII of 1868, B. C.), sections 1, 14—Ejectment—Revenue Sale Law (Act XI of 1859), section 29—Subsisting title at date of suit—Title, recognition of, as tankidar, if sufficient to give right of suit—"Revenue" and "proprietor," meaning of—Tankidar, amount due from, and payable to Government—Revenue—Sale by Collector for Government dues, if legal—Occupancy raiyats, protection of, from ejectment—Sale, effect of—Suit, frame of—Multifariousness—Tanki tenures, nature of settlement of—Regulation VII of 1822, section 10, Clauses 3, 4, 5, 7, 8.—Origin and incidents of such tenancies.

The word "revenue," as defined in Act VII of 1868, (B. C.) includes every sum annually payable to the Government by the proprietor of an estate or tenure in respect thereof; and the word "proprietor," includes any tenant by whom any estate or tenure is held directly under the Government.

Upon the disappearance of the zemindars who held the tenures (*tanki tenures*) directly from the Government under successive temporary settlements, upon their refusal to take fresh settlements at the time of a re-settlement, the *tankidars* came into direct relations with the Government and became proprietors of the tenures which were thenceforth held by them under the Government within the meaning of section 1 of Act VII of 1868, (B. C.) and the sum annually payable by them in respect of the tenures would be rightly described as revenue, within the meaning of the same provision of the law; and the Collector has ample authority to bring such tenures to sale under the provisions of Act VII of 1868, (B. C.)

If the *tankidars* in a body are the tenure-holders liable for the payment of the Government revenue, each of them *prima facie* has to contribute a portion of the sum payable. The payment of such sum by any *tankidar* is payment by him in his character as a member of the body of *tankidars*; merely because he cultivates the land in his occupation, he cannot be regarded as a cultivating raiyat under the entire body of *tankidars* which includes himself as a member. The *tankidars* cannot therefore be regarded as occupancy raiyats protected from eviction under section 14 of Act VII of 1868, (B. C.)

The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendant prefers to hold possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action. What the plaintiff is entitled to claim is the recovery of possession of the land as a whole and not in fragments, and all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to the suit in which he seeks to eject them, and particularly so, when they combine to keep him out of possession.

Nundo Kumar Nasker v. Banomali Gayan (1) referred to.

* Appeal from Appellate Decree No. 658 of 1905.

(1) (1902) I. L. R. 29 Calc. 871.

It cannot be affirmed as a matter of law that upon default of payment by a *tankidar*, the entire village is liable to be brought to sale so as to destroy the rights of all the tenure-holders. The question depends upon the circumstance whether the settlement originally was under clauses 3, 4 and 5 or under clauses 7 and 8 of section 10 of Regulation VII of 1822.

The fundamental distinction between the two kinds of settlement is that in the case of a settlement under clauses 2, 3 and 4, the settlement is made with a *Sudder Malguzar* who represents all the persons interested in the property, and his default makes the entire tenure liable for sale unless there is a provision to the contrary in the settlement; and in the case of a settlement under clauses 7 and 8, there is a settlement with a selected person as *Sudder Malguzar*, but his default does not make the entire tenure liable to sale, unless there is a specific provision to the contrary in the settlement.

A settlement can be made under clauses 7 and 8 only in the case of cultivating proprietors who hold their tenure in *putteedari* or *bhyacharee* or similar form.

Ram Gobind Roy v. Syud Kushuffadoza (2) referred to.

Appeal by the Defendants.

Suit in ejectment.

The facts of the case appear fully from the judgment.

Babu Pravas Chandra Mitter for the Appellants.

Dr. Rash Behary Ghose and *Babu Ram Chandra Mazumdar* for the Respondent.

C A. V.

The judgment of the Court was delivered by

Mookerjee J.—On the 16th July 1894 the plaintiff respondent purchased at a sale held by the Collector of Puri under Act VII of 1868 (B.C.) a *tanki tenure*, Trilochanpore which bears Touzi No. 9 on the Collectorate rolls of that district. On the 21st September 1900, the plaintiff commenced the action out of which this appeal arises for ejectment of 168 persons upon the allegations that they were the defaulting *tankidar*, that their interest in the property had passed at the sale and that inspite of delivery of possession to the plaintiff under section 29 of Act XI of 1859, they had not only continued in actual occupation, but, had, in the course of the recent settlement proceedings, got themselves registered as the persons in possession. The defendants resisted the claim on various grounds amongst which it is sufficient to mention for our present purposes that they challenged the title of the plaintiff, questioned the frame of suit and denied that their own title had been in any way affected by the sale. The Courts below have overruled these objections and made a decree in favour of the plaintiff. The defendants have appealed to this

(2) (1870) 14 W. R. 1; (1871) 15 W. R. 141.

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Court and on their behalf the decision of the District Judge has been assailed substantially on five grounds, namely, *first*, that the plaintiff had not at the date of the commencement of the suit any subsisting title, *secondly*, that his purchase under a sale held in pursuance of Act VII of 1868 was void inasmuch as the provisions of that Act were not applicable to the recovery of the arrears due; *thirdly* that the defendants had acquired a right of occupancy which was in no manner affected by the sale; *fourthly* that the suit as framed was bad for multifariousness and, *fifthly*, that the plaintiff by virtue of his purchase was at most entitled to collect rent from the defendants whose title as *tunkidars* had not been extinguished by the sale.

In support of the first contention advanced on behalf of the appellants, it has been pointed out that the period of the settlement which was current when the plaintiff purchased in 1894, has subsequently expired and that in September 1900, when the plaintiff commenced this action he had not obtained a fresh settlement. It is argued consequently that at the date of the institution of the suit the plaintiff had no subsisting title. In our opinion there is no force in this contention. It is not disputed that the plaintiff purchased the disputed tenure in 1894, whatever the effect of his purchase may be on the title of the defendants. Since the date of his purchase the term of the settlement has expired but although he has not executed a fresh *kubulyat* in favour of the Government, his title has been recognised by the settlement authorities and his name has been entered in the settlement proceedings as the *tankidar*. It is obvious, therefore, that he had a subsisting title at the date of the institution of the suit.

In support of the second ground upon which the decision of the District Judge is challenged, two reasons have been advanced. It has been contended, in the first place, that the provisions of Act VII of 1868 have no application because the Government stands in the position of the zemindar who has been expropriated and consequently the Government is not entitled to recover arrears by any procedure which was not open to the zemindar. It has been contended in the second place that the sum payable by the defendants to the Government was not revenue within the meaning of Act VII of 1868 and could not accordingly be recovered in the manner laid down in that Act. To appreciate this argument it is necessary to remember that originally the estate within which the disputed tenure is comprised, was held by

a zemindar from the Government under successive temporary settlements. In the early years of the 19th century, upon the expiry of the term of one of these temporary settlements, the zemindar for the time being declined to accept a settlement. Upon the refusal of the proprietor to accept the terms of the settlement offered to him, the Government decided to hold the estate in *khas* and the zemindar was allowed the usual *malikana*. The result was that the tenure-holders who were originally liable to pay rent to the zemindar came into direct relations with the Government. The question, therefore, arises whether the amount payable by them to the Government under these circumstances became revenue within the meaning of Act VII of 1868. Section 1 of the Act defines the word revenue to include every sum annually payable to the Government by the proprietor of an estate or tenure in respect thereof. The word 'proprietor' is further defined to include any tenant by whom any estate or tenure is held directly under the Government. It follows, consequently, that, inasmuch as upon the disappearance of the zemindar, the predecessors of the defendants were brought into direct relations with the Government, they became proprietors of the tenure which was henceforth held by them under the Government within the meaning of section 1 and the sum annually payable by them in respect of the tenure would be rightly described as revenue within the meaning of the same provisions of the law. It is clear, therefore, that the Collector had ample authority to bring the tenure to sale under the provisions of Act VII of 1868. There is no force in the suggestion that as the Government stands in the place of the expropriated zemindar, no remedy is open to the Government other than what was available to the zemindar himself, and that the amount recoverable by the Government was not revenue within the meaning of Act VII of 1868. The validity of the sale cannot consequently be challenged on this ground.

The third ground upon which the defendants seek to resist the claim of the plaintiffs is that they are occupancy raiyats and are not liable to ejectment. This defence is founded apparently upon section 14 of Act VII of 1868 which provides that although under section 12, the purchaser of any tenure sold under the provisions of section 11 acquires it free from all incumbrances which may have been imposed upon it after its creation or after the time of settlement whichever may have last occurred, and is entitled to avoid and annul all under-tenures and forthwith

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to eject all under-tenants with certain exceptions specified in section 12, yet such purchaser is not entitled to eject any raiyat having a right of occupancy at a fixed rent or at a rent assessable according to fixed rules under the laws in force. No doubt if the defendants can establish that they are raiyats of the description contemplated by section 14, they would be protected from ejectment; but the line of argument by which they endeavour to prove this position, though injurious, is entirely unsound. They contend that all the *tankidars* as a body constituted tenure-holders and were liable for the payment of the assessment imposed by the Government. At the same time each of these *tankidars* cultivated the portion of land in his possession and had to contribute towards the payment of the assessment proportionate to the quantity of land held by him. Each *tankidar*, therefore, it is argued, may be regarded as a cultivating tenant under the entire body of *tankidars*, and in this character may be treated as a raiyat having a right of occupancy. This argument is manifestly fallacious. If the *tankidars* in a body are the tenure-holders liable for the payment of the Government revenue, each of them *prima facie* would have to contribute a portion of the sum payable. The payment of such sum by any *tankidar* would be payment by him in his character as a member of the body of *tankidars*; merely because he cultivates the land in his occupation, he cannot be regarded as a cultivating raiyat under the entire body of *tankidars* which includes himself as a member. To accede to the argument advanced on behalf of the appellant would be to give effect to a fiction which has neither any solid foundation in fact nor is supported by any reliable analogy. We must consequently hold that the defendants cannot be regarded as occupancy raiyats protected from eviction under section 14 of Act VII of 1868.

The fourth ground upon which the decision of the District Judge is challenged is that the suit as framed is multifarious. It is contended by the learned vakil for the appellants that the plaintiff was not entitled to join all these defendants in one action inasmuch as they are in occupation of different parcels of land. In our opinion there is no force whatever in this contention. In support of our view it is sufficient to refer to the decision of this Court in the case of *Nundo Kumar Nasker v. Banomali Gayan* (1) in which the principle applicable to cases of this description was fully explained. It was pointed out by the

(1) (1902) I. L. R. 29 Calc. 871.

learned Judges who decided that case, that the cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendants profess to hold possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action. If this is so, where there is but one person in possession, can there be a difference when the land is in possession of more than one? We think not. It appears to us, so far as the plaintiff's cause of action is concerned, that it is a matter of indifference to him upon what ground the different persons in possession may seek to justify the wrongful detention of what is his. What he is entitled to claim, is the recovery of possession of the land as a whole and not in fragments, and all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to the suit in which he seeks to eject them. It may further be added that in the case before us it has been found by the learned District Judge, that the defendants had combined to keep the plaintiff out of possession. What gives the plaintiff his cause of action, therefore, is the wrongful detention of the land which is his and in this view of the matter the objection to the suit on the ground of multifariousness entirely fails.

The fifth ground upon which the judgment of the District Judge is assailed is that he has taken an erroneous view of the effect of the purchase made by the plaintiff upon the title of the defendants. This contention is sought to be supported by two arguments in the alternative, namely, *first*, that there was a separate settlement by the Government with each *tankidar* and that, therefore, the sale of the *tanki* under one proceeding was void; and *secondly*, that the effect of the sale was to vest in the plaintiff the title of the *reportdar* through whom the revenue was paid and that the plaintiff was not entitled to recover *khas* possession. As regards the first branch of this contention there is, in our opinion, no foundation for it. The learned District Judge has found in concurrence with the Court of first instance that, for more than 50 years previous to the date of the sale, the Government always appears to have recognised a joint liability on the part of the *tankidars* and to have treated the mouza as liable for one entire jama. It was suggested on behalf of the appellants that this finding is based upon a mis-construction of the settlement *robokari* of the 16th January 1841. The respondent in answer to this contention undertook to produce before this Court

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the settlement *robakari* of 1842 and some other papers which he alleged, showed that the conclusion of the District Judge is well-founded. As the settlement *robakari* of 1841 was not quite clear or conclusive on the point, we allowed the plaintiff respondent to produce the other papers we have just mentioned. These documents make it reasonably clear that the tenure has been for over half a century treated as an entire tenancy. We must consequently hold that the validity of the purchase made by the plaintiff cannot be successfully challenged on this ground. The second branch of the contention of the appellant however raises a question of greater difficulty, the true solution of which depends upon the nature of the settlement by which this *tanki* tenure was created. It is contended by the learned vakil for the appellants that assuming that the revenue in respect of the tenure was jointly payable by all the *tankidars* and that it was payable through one of their member called the *reportdar*, the settlement was of a character which did not render the interest of all the *tankidar* liable to forfeiture upon a sale held by reason of the default of the *reportdar* in the payment of the revenue. It is argued, on the other hand, by the learned vakil for the respondent that the settlement was of a character which made the *reportdar* the agent of the *tankidars* and that a sale held by reason of the default of the *reportdar* in the payment of the revenue destroyed not only the interest of the *reportdar* but of every member of the village community. In order to determine which of these contentions ought to prevail, it is necessary to investigate whether the settlement was under clauses 7 and 8 of section 10 of Regulation VII of 1822 or under clauses 3, 4 and 5 of the same section. If the settlement was made under the provisions of clauses 7 and 8, the argument of the appellant must be treated as well-founded. If on the other hand the settlement was under clauses 3, 4 and 5 the contention of the respondent must prevail. The facts found by the learned District Judge are not sufficient for the solution of this question and the additional evidence which has been produced in this Court is also insufficient to dispose of the matter. Under these circumstances it would be necessary to remit the case under section 566, Civil Procedure Code, read with section 587, for investigation of this point. We shall however, explain the distinction between the two kinds of settlement referred to in section 10, so that the Court below may have no difficulty in determining the facts upon which the answer to the question raised must ultimately depend. Clause 2 of

section 10 of Regulation VII of 1822 contemplates a case in which any land appertaining to a mehal hitherto recognised as a *taluk* of one or more *sudder malguzars* may be owned or occupied by other persons holding under the *sudder malguzary* and possessing an heritable and transferable property therein, clause 3 provides that in cases in which two or more persons may possess a joint property in any village, mehal, or parcel of land, (the property of such persons, consisting of an interest of the same kind, whether of the same extent or otherwise) it shall be competent to the Collector either to make a joint settlement with the parties collectively or a majority of them or with an agent appointed by them or a majority of them or to select one or more of them to undertake the management of the *mehal* as *sudder mulguzary*. If it is determined to make a joint settlement as provided in clause 5, then the interests and estate of all *malguzars* shall, unless otherwise specially allowed, be held responsible for the Government Revenue and be liable to sale in the event of any arrears accruing on account of the settlement. It is clear, therefore, that if a joint settlement is made under clauses 2, 3 and 4 all the *malguzars* are jointly responsible for the payment of the Government Revenue although the Mehal is under the management of one of them as an agent or *sudder malguzar* and if default is made by the agent or manager or *sudder malguzar* the entire tenure is liable to sale ; but even in these cases the terms of the settlement may provide that the entire tenure will not be liable to sale by reason of the default of the agent or manager or *sudder malguzar* to pay the revenue. Clause 7 and 8 of Sec. 10 deal with the settlement of an entirely different description. Clause 7 contemplates a settlement of a mehal or portion of a mehal held by a number of cultivating proprietors in *putteedary* or *bhyachary* tenure or the like. This clause provides for adjustment of rent payable by such cultivating proprietors. Clause 8 then defines the incidents of such settlement and lays down that the settlement may be made with one or more of the persons selected to manage, collect or account for the public revenue as *sudder malguzar*. So far the provisions is analogous to the provisions for an agent or manager or *sudder malguzar* in the case of a settlement under clauses 2, 3 and 4 ; but here follows an important variation. Clause 8 provides that when a settlement is made with a selected person as *sudder malguzars*, the interests of the non-engaging parceners shall not be held answerable for the default of the *sudder mulguzar*, save and except in so

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far as may be specifically provided. The fundamental distinction between the two kinds of settlement therefore is obviously this : in the case of a settlement under clauses 2, 3 and 4 the settlement is made with a *sudder malguzar* who represents all the persons interested in the property ; and his default makes the entire tenure liable for sale unless there is a provision to the contrary in the settlement. In the case of a settlement under clauses 7 and 8 there is a settlement with a selected person as *sudder malguzar* but his default does not make the entire tenure liable to sale, unless there is a specific provision to the contrary in the settlements. The mere fact therefore that in the case of any tenancy, the revenue is payable through a *reportdar* or agent or manager or *sudder malguzar*, does not indicate whether the settlement is of the one description or the other. It must be determined upon evidence, if the question arises, whether the settlement was made under clauses 2, 3 and 4 or under clauses 7 and 8. It will further be observed that a settlement can be made under clauses 7 and 8 only in the case of cultivating proprietors who held their tenure in putteedari or bhyacharee or similar form. It is not necessary for our present purpose to examine in detail the incidents of putteedari or bhyacharee tenures, but reference may be made to Mr. Field's Regulations of the Bengal Code, Introduction, Chapter II, Secs. 46 and 47 (page 48) where these tenures are described. Reference may also be made to the cases of *Ram Gobind Roy v. Syud Kashuffuddza* (1) in which, it was pointed out that the operation of clauses 7 and 8 is limited only to cases of cultivating proprietors holding under putteedari or bhyacharee tenures or the like. To determine whether in the present case the original settlement was under clauses 7 and 8 as alleged by the appellants or under clauses 3, 4 and 5 as alleged by the respondent, the Court below must ascertain, first, whether the persons with whom the settlement was made were cultivating proprietors, and secondly, if they were cultivating proprietors, whether they held under the putteedari or bhyacharee tenure or any analogous system. We may add that our attention was invited to a passage from Mr. Maddox' final report on the survey and settlement of the Province of Orissa 1890-1900, volume (1) page 213 in which the following statement occurs. "These Sasan villages appear to have been founded by groups of Brahmins from the west who were brought to Orissa by the Hindu Kings and continued to hold the villages at a *tanki*

(1) (1870) 14 W. R. 1, (1871) 15 W. R. 141.

rent or *sanads* from the Raja of Khurda or the Mahrattas. The assessment made was on the total cultivated area of the village and so long as the whole amount was paid into the treasury the village community were at liberty to make their own arrangements for its distribution. They paid the revenue through elected representatives called *reportaars* who at the last settlement entered into engagements with the Government on behalf of the individual tenure-holders but on default the whole village was liable to be brought to sale." It is obvious, however, that it cannot be affirmed as a matter of law that upon default of payment by a *tankidar* the entire village is liable to be brought to sale so as to destroy the rights of all the tenure-holders. The question depends as we have already explained, upon the circumstances whether the settlement was under clauses 3, 4 and 5 or under clauses 7 and 8 of section 10 of Regulation VII of 1822 : whether the settlement could be made under the one set of provisions or the other would again depend upon the circumstance whether the persons interested were cultivating proprietor holding under *putteedari* or *bhyacharee* or similar tenure or whether the proprietors had a different status. This is the fundamental point in the case and upon a careful examination of the records we are satisfied that it was overlooked in the Courts below.

The result, therefore, is that the case must be remitted to the District Judge under section 566, Civil Procedure Code, for decision of the question whether in the case of the disputed *tanki*, the settlement was originally made under the provisions of clauses 3, 4 and 5, or under clauses 7 and 8 of section 10 of Regulation VII of 1822. As this point does not appear to have been clearly appreciated in the Courts below, the parties will be at liberty to adduce fresh evidence to be taken either by the District Judge himself or by the Subordinate Judge under his direction, to be submitted to him for return of a finding to this Court. The papers which have been produced in this Court will be made part of the record and will be sent down to the Court below along with it. The costs of this appeal will be dealt with when it is finally heard.

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Case remanded.

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Before Mr. Justice Stephen and Mr. Justice Mookerjee.

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Res judicata—Civil Procedure Code (Act XIV of 1882), section 13.—“Competent to try such subsequent suit, or the suit in which such issue has been subsequently raised,” meaning of—Court of competent jurisdiction—Original or Appellate Court.—Competency in regard to the whole or part of the subject matter of litigation.

Under the present Civil Procedure Code (Act XIV of 1882), in order to establish the plea of *res judicata*, it has to be shown that the Court of concurrent jurisdiction which decided the former suit, was a Court of jurisdiction competent to try the subsequent suit.

Misir Raghobardial v. Raja Shoo Bahsh Singh (1), *Rajah Run Bahadoor Singh v. Mussamat Lachoo Koor* (2), *Ramdoyal v. Janki Das* (3) and *Panga v. Uninkuthi* (4) referred to.

Toponidhee Dhiraj Gir Gosain v. Sreeputty Sahane (5) explained and distinguished.

In order to establish the plea of *res judicata*, the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised.

Gokul Mandar v. Pudmanund Singh (6) referred to.

It is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which the suit was ultimately decided on appeal.

Bharasi Lal v. Sarat Chunder (7), *Koylas Chandra v. Tarak Nath* (8) and *Ram Gopal v. Prosunna Kumar* (9) referred to.

Bhugwanbutti Chowdhurani v. A. H. Forbes (10), and *Pathuma v. Salimamma* (11) distinguished.

Appeal by the Defendant.

Suit for declaration and for joint possession.

Babus Nilmadhab Bose, Shib Chandra Palit and Ram Chandra Mazumdar for the Appellants.

Babus Lal Mohun Doss and Girish Chandra Pal for the Respondents.

* Appeal from Appellate Decree No. 269 of 1906, against a decree of J. J. Platel, Esq. District Judge of Cuttack, dated the 4th January 1906, confirming that of Babu Bidhubhushan Chakravarti, Subordinate Judge of Cuttack, dated the 21st February 1905.

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| (1) (1882) L. R. 9. I. A. 197. | (6) (1902) I. L. R. 29. Calc. 707. |
| (2) (1884) L. R. 12. I. A. 23. | (7) (1895) I. L. R. 23. Calc. 415. |
| (3) (1900) I. L. R. 24. Bom. 456. | (8) (1897) I. L. R. 25. Calc. 571 (576.) |
| (4) (1900) I. L. R. 24. Mad. 275. | (9) (1905) 10. C. W. N. 529. |
| (5) (1880) I. L. R. 5. Calc. 832. | (10) (1900) I. L. R. 28. Calc. 78. |
| (11) (1884) I. L. R. 8. Mad. 83. | |

The material facts appear from the judgments which are as follows :

Stephen J.—In this case the plaintiff sues for a declaration of his title to an 8 annas share in certain property, for joint possession thereof with the principal defendants and for mesne profits. In the lower Courts the case was contested chiefly on questions of fact relating to the family geneology and the history of the property in relation to the family of which all the parties were members, which were decided in the plaintiff's favour and with which we are not concerned. A point of law was however raised on behalf of the defendant which has been argued before us on a second appeal. This is that the suit is *res judicata*, and it arises as follows. Some years ago the plaintiff sold certain lands to one Gobinda Charan Mangraj, and defendant No. 1 in the present suit, one of the appellants before us, sued in the Court of the Munsiff of Kendrapara for recovery of the possession of the property so conveyed, and to have the kobala granted by the present plaintiff to his vendee set aside. He succeeded in the former claim, judgment being given in his favour on the 14th August 1899, on the ground that the present plaintiff had no share in the disputed land and that the relationship between the plaintiff and the first defendant, and consequently the other defendants, found as proved in the present case did not exist. This decision was affirmed on appeal to this Court. There is no finding before us, as to the identity of the land affected by Munsiff's decree with that now in suit, or any part of it. The kobala granted by the plaintiff to Gobinda is however on the record and boundaries are given therein which might show that such lands are part of those now sued for. They appear only to be a part because the present suit is not within the jurisdiction of a Munsiff, and it is not suggested that they are more than a part.

The question before us, therefore, resolves itself into two parts. *First*, can the present suit be entertained as to so much of the land in suit as was the subject matter of the suit in the Munsiff's Court? *Secondly*, can the issue whether the plaintiff is related to the defendant, as alleged, be tried in the present suit after having been decided before the Munsiff? The answer of course depends primarily on section 13 of the Civil Procedure Code which runs so far as it is material as follows. "No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue

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in a former suit between the same parties . . . litigating under the same title in a Court of jurisdiction competent to try such subsequent suit, or the suit in which such issue has been subsequently raised, and has been heard and finally determined by such Court." Taking the second point first, the truth of the geneology was an issue before the Munsiff and is an issue here: and it follows from the judgment of Banerjee J. in *Rai Charan Ghose v. Kumud Mohun Dutt Chowdhry* (1) based on the cases there referred to and followed in *Ramgopal Mozumdar v. Prasunno Kumar Sanial* (2), that what we have to consider is the competency of the Munsiff to try the present suit, not that of the High Court by whom his decision was affirmed on appeal. This concludes the question as the present suit is beyond the Munsiff's jurisdiction. The case of *Toponidhee Dhirj Gir Gosain v. Sreeputty Sahanee* (3), is referred to by the lower appellate Court, but has not been relied on by the appellant here; as it was decided on the Code repealed by the present Civil Procedure Code, which alters the law on the subject.

On the first point we are invited to follow the decision in *Bhugwabutti Chowdhurani v. Forbes* (4) followed in the second case above mentioned. That case is however distinguishable from the present in an essential feature. There the plaintiff sued before a Subordinate Judge for road and public works cesses, embankment cesses, dak cesses and other matters designated as "etc." Claiming an amount which exceeded that for which he could sue before a Munsiff the defendant had sued for a refund of what he had paid for road and public works cesses, and the suit was decreed on the ground that the plaintiff was not liable to pay the cesses at the enhanced rate claimed. It was held that the plaintiff in the second suit could not gain a cause of action on which he had been previously defeated with new causes of action, and that such an action amounted to an evasion of section 13. In the present case it was not open to the plaintiff to decide his cause of action as he might have done in the former case. By section 43 he was compelled "to include the whole of the claim which (he was) entitled to make in respect of the cause of action." The land he sued to recover was all held under one title according to his case. He might it is true have omitted the land which was subject matter of the action before the Munsiff, and it may be argued that this was

(1) (1898) I. L. R. 25 Calc. 576.

(2) (1906) 10 C. W. N. 529.

(3) (1880) I. L. R. 5 Calc. 832.

(4) (1900) I. L. R. 28 Calc. 78.

not land he was entitled to make a claim in respect of. But this argument is not of sufficient force to induce me to contend the principle of the decision to a case where the facts differ so essentially. The principle makes an apparent, though not a real, inroad on the meaning of section 13, to extend it as suggested to this case, could in my opinion be making the inroad a real one. The appeal is accordingly dismissed with costs.

Mookerjee J.—The only substantial question of law which calls for decision in this appeal is whether the suit is barred by the principle of *res judicata*. The Courts below have concurrently answered this question against the appellants.

It is argued before this Court that the suit is barred by *res judicata*, first, because the question of title to the disputed property which turns upon the relationship of the parties was directly and substantially in issue in the litigation of 1899 and was then decided in favour of the present appellants, and secondly, because the question of title, in so far as it affects that portion of the disputed property which form the subject matter of the litigation of 1899, can, in no view of the matter, be re-opened for a fresh adjudication.

In support of the first branch of this argument, reliance is placed upon the decision of this Court in the case of *Toponidhee Dhiraj Gir Gosain v. Sreeputty Sahanee*(1). It is clear, however, that although that decision has never been formally dissented from, the rule laid down therein can no longer be regarded as good law. That case turned upon the construction of section 13 of Act X of 1877, the language of which was materially different from the language of section 13 of Act XIV of 1882. In the present Code, the words "competent to try such subsequent suit or the suit in which such issue has been subsequently raised" were expressly added, so as to make it quite clear that the competence required is in respect of the subsequent suit also. This view is amply supported by the decision of their Lordships of the Judicial Committee in *Miser Raghobardayal, v. Rajah Sheo Baksh Singh* (2), *Raja Run Bahadoor Singh v. Lachoo Koer* (3). Under the present Code, in order to establish the plea of *res judicata* in a case of the description now before us, it has to be shown that the Court of concurrent jurisdiction, which decided the former suit, was a Court of jurisdiction competent to try the subsequent suit. (See *Ramdayal v. Fanki* (4), *Panga v. Unni Kutti* (5). It follows, therefore, that the first branch of the contention of the appellants cannot be sustained.

(1) (1880) I. L. R. 5 Calc. 832.

(2) (1882) L. R. 9 I. A. 197.

(3) (1884) L. R. 12 I. A. 23.

(4) (1900) I. L. R. 24 Bom. 456.

(5) (1900) I. L. R. 24 Mad. 275.

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The second branch of the contention of the appellants is that the suit is barred by *res judicata* at least with respect to that portion of the disputed property which is alleged to have been the subject matter of the previous litigation. In support of this position reliance is placed upon the cases of *Bhugwanbutti Chowdhurani v. A. H. Forbes* (1) and *Ramgopal v. Prasuuna Kumar* (2). The decision of the question raised, however, must depend primarily upon the language of the Code, which seems to me to make it reasonably plain that in order to establish the plea of *res judicata*, the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit itself in which the issue is subsequently raised. In support of this proposition, it is sufficient to refer to the decision of their Lordships of the Judicial Committee in *Gokul Mandar v. Pudmanund Singh* (3) in which Lord Davey pointed out that section 13 of the present Code, which embodies the principle just enunciated, goes in this respect beyond section 13 of the previous Code (Act X of 1877) and also beyond the law laid down by the Judges in the *Duchess of Kingston's case* (Smith. L. C., Vol. II, 713.) Lord Davey further observed that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a judge to disregard or go outside the letter of the enactment according to its true construction. If the principle thus interpreted by the Judicial Committee is applied to the case before us, there can be no possible controversy that the plea of *res judicata* cannot be sustained.

It was faintly suggested, however, on behalf of the appellants that as in the previous litigation the decision of the Court of first instance was subsequently affirmed by this Court, and as in the present litigation also the matter has been carried before this Court, the plea of *res judicata* ought to be allowed, or, in other words, that the true criterion is the competency of the Court of appeal to decide the question. In my opinion, this contention is not well-founded. It is now firmly settled that it is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which the suit was ultimately decided on appeal. (See *Bharasi Lal v. Sarat Chunder* (4), *Koylash Chandra v. Tarak Nath* (5) and *Ramgopal v. Prosanna Kumar* (2).)

It was argued, further that the view we take, is inconsistent

(1) (1900) I. L. R. 28 Calc. 78.

(3) (1902) I. L. R. 29 Calc. 707.

(2) (1905) 10 C. W. N. 529.

(4) (1895) I. L. R. 23 Calc. 415.

(5) (1897) I. L. R. 25 Calc. 571 at 576.

with the decision of this Court in *Bhagwanbutti Chowdhurani v. A. H. Forbes* (1). It may be a matter for controversy, whether some of the observations, at any rate in the decision relied upon may not be difficult to reconcile with the provisions of section 13 of the Code as interpreted in the judgment of the Judicial Committee to which reference has been made. This much is clear, however, that the decision turned upon facts and circumstances, which are essentially distinguishable from those of the case before us, for the reasons set forth in the judgment of my learned brother.

Reliance was also placed upon the decisions of the learned Judges of the Madras High Court in *Pathuma v. Salimamma* (2) with reference to which, it is only necessary to observe that although it was decided after the present Code had come into force, some of the observations, at any rate, appear to be based upon the law as it was understood to be under the Code of 1877.

On these grounds, I must hold that the second branch of the contention of the appellants cannot be supported. The appeal consequently fails and must be dismissed with costs.

B. M.

Appeal dismissed.

(1) (1900) I. L. R. 28 Calc. 78.

(2) (1884) I. L. R. 8 Mad. 83.

Before Mr. Justice Rampini and Mr. Justice Brett.

BUJRANGI RAUT AND OTHERS

v.

M. H. MACKENZIE.*

Ejectment, suit for—Cultivating raiyat—Leases, construction of—Occupancy right, accrues in what land—Bengal Tenancy Act (VIII of 1885), section 21.

Under the provisions of section 21 of the Bengal Tenancy Act, if a tenant is an occupancy or settled raiyat in respect of some lands in a village, he is entitled to possession as an occupancy raiyat of the whole of the lands he holds in the village, *provided* he holds them (that is, the lands other than those of which he is an occupancy or settled raiyat) as a raiyat. But if he holds them as a tenure-holder, his occupation of some lands as a raiyat will not give him the rights of a raiyat in the other lands.

Suit for recovery of possession on ejectment of the Defendant.

Appeal by the Plaintiffs.

The facts of the case appear fully from the judgment.

Dr. Rash Behary Ghose and Babu Umakali Mukerjee for the Appellant.

Babu Karuna Sindhu Mukerjee (for *Babu Sarada Charan Mitra*) and *Babu Samatul Chandra Dutt* for the Respondent.

* Appeals from Appellate Decrees Nos. 2252, 2385 of 1898 against the decrees of A. E. Staley, Esq., District Judge, Tirhoot, dated the 2nd August 1898, affirming those of Babu Nilmani Das, Subordinate Judge of Tirhoot, dated the 28th February 1898.

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Bujrangi Rant
 v.
 M. H. Mackenzie.

The judgment of the Court was delivered by

Rampini J.—This is an appeal from a decision of the District Judge of Mozufferpur, dated the 2nd of August 1898.

The suit out of which the appeal arises is one brought by certain proprietors of land, situate in Mouzah Baijnath Beshi, for ejectment of the defendant, M. H. Mackenzie, who is described as the son of John Mackenzie, deceased, and as being an indigo-planter and the proprietor of Kothi Halimpur, otherwise called Rajkhund Awrai.

The allegations of the plaintiffs are that they granted *ticca* leases to the proprietor of this Halimpur indigo concern, that the defendant has been holding the lands under these leases, that the term of the last of the leases expired on the 1st Ashin 1301 F. S., but that the defendant is still in possession of the lands, and that, by virtue of the stipulations contained in the *ticca potta* of the 15th April 1880, the plaintiffs are entitled to the rent of the 10 *anna kist* of 1301.

The defence of the defendant is that he is an occupancy *raiyat* of the land in dispute, the area of which is about 41 bighas, and that, therefore, the plaintiffs are not entitled to eject him

The first Court found that the defendant was an occupancy *raiyat* as regards 15 *bighas* leased to the Factory in the year 1861, at a rental of Rs. 30 and that, so far as the rest of the land was concerned, the defendant had no occupancy right whatever; and the Subordinate Judge accordingly gave the plaintiffs a decree for ejectment of the defendant from the rest of the land, leaving the defendant in possession of 15 *bighas*, the boundaries of which were, however, not determined. The Subordinate Judge, therefore, gave the defendant permission to retain possession of any 15 *bighas* he chose to select.

On appeal to the District Judge, that officer affirmed the finding of the Subordinate Judge with regard to the 15 *bighas*; but he held that defendant was an occupancy *raiyat* as regards all the lands in dispute, and he, therefore, dismissed the suit.

The plaintiffs now appeal to this Court, and on their behalf it has been contended, *first*, that the District Judge was wrong in holding that the defendant is a *raiyat* as regards any portion of the land in dispute, and, *secondly*, that possession of the land by the Factory cannot be possession of the land by a *raiyat*, and, therefore, the defendant ought to be ejected from the land.

With regard to the first contention we would say that it appears to us that the finding of the District Judge cannot be

supported, at least upon most of the documentary evidence adduced in the case.

The first lease, Exhibit E, granted on the 4th of December 1861 to Charles Swayne, as proprietor of an 8 *anna* share of the Factory at Halimpur, and as muktear of William Thomson, the proprietor of the other 8 *anna* share at a rental of Rs. 30 for seven years, is undoubtedly a cultivating lease. But we cannot take the same view of the subsequent leases under which the defendant now purports to hold the land. The next of these leases is one dated the 21st of October 1863. It is marked Exhibit F and it purports to be a lease by the plaintiffs for 3 *annas* 10 *gandas* 2 *cowries* of the 16 *annas* of Mouzah Baijnath Beshi. It is granted to Henry Brown, muktear for W. Thomson, proprietor of the Factory at Halimpur, at a yearly rent of Rs. 120 6 *annas*, and it also purports to convey to the grantee the 15 *bighas* of land covered by the previous *potta* of the 4th December 1861. This lease was granted for 7 years, from 1271 to 1277. In this lease the grantee is described a *ticcadar* and permission is given to him to cultivate, and cause to be cultivated, the lands in a satisfactory manner. This lease was succeeded by another, which is marked Exhibit II. This lease is in the form of a *kabuliat*, executed by A. R. H. McQueen, muktear of W. S. Mackenzie, proprietor of the Factory of Halimpur, and is a lease of a 3 *annas* 10 *gandas* 2 *cowries* share of Mouzah Baijnath Beshi for 5 years, 1282 to 1286. In it there is no distinction made between the 15 *bighas* originally granted to Charles Swayne and William Thomson and the remainder of the land leased by Exhibit F on the 21st of October 1863. It further conveys some other lands at the rate of 2 rupees per *bigha* at an annual *jama* of Rs. 107-14 *annas*: so that the total rent comes to Rs. 301 12 *annas* 9 *pies*. It appears from this document that a sum of Rs. 1200 had been advanced as *xurpeshgi* to the plaintiff by the Factory, which was to be paid off with interest within 5 years, and deducting the amount of the instalment of the principal of the sum which was to be paid off each year and of the interest thereon, there was a balance due on account of the rent by the Factory to the plaintiffs of Rs. 37-3-6 which was all that the Factory had to pay during each of those 5 years. The date of this *kabuliat* is the 12th April 1874. In connection with this lease, there is a very important document on the record, namely, Exhibit I, which is the counterpart of the *kabuliat* which the Factory was apparently at first prepared to execute. This docu-

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ment bears date the 3rd May 1873 ; and in this *potta* the amount of the rent of the 15 *bighas* is separated from the rent of the rest of the land leased to the Factory. The rent of the former is stated to be Rs. 30 and of the latter, Rs. 163-14-9, total Rs. 193-14-9. In this *potta* we observe that there is a distinction made between the two classes of land occupied by the Factory. But the plaintiffs apparently did not deliver this *potta* to the Factory, and the Factory were therefore compelled to execute the *kabuliat* (Exhibit II) of the 12th April 1874, in which there is no distinction between the two classes of land and in which the rents of the two classes of land are not separated but are computed together in one sum, viz., Rs. 193-14-9.

Then, the next document is Exhibit III, which is a lease executed on the 15th April 1880, by David Russel Crawford, the amukhtear of John Francis Mackenzie, who perhaps was the father of the present defendant, for a 3 *anna*, 10 *gunda* 2 *cowries* share of the property at a rental of Rs. 286. 10 *as*. for a period of 13 years, from 1288 to 1300, and which further provides for repayment of a sum Rs. 2500 advanced as *zurpeshgi*.

Now, the learned District Judge has interpreted these leases as being cultivating leases and as giving occupancy rights to the defendants ; and there is not the slightest doubt that as regards the first lease, that is, the lease of the 4th December 1861, relating to the 15 *bighas*, he is perfectly right. But we cannot take the same view as he has done of the remainder of the leases. In the first place, it will be seen that in Exhibit F the grantee is spoken of as *ticcadar*, and in Exhibit II, dated the 12th April 1874, the grantee is described in a similar manner. Although this latter lease gives to the grantee the right to cultivate personally the share of the mouzah or to cause it to be cultivated by others, yet there are certain provisions in it which seem to us to convey to the defendant not the rights of a cultivating *raiyat*, but the rights of a tenure-holder, as it will be seen that the plaintiffs convey to the grantee by this document " all zemindari rights, save and except *brohmoter*, *shebattar*, and *bishnuuprit* land, etc , prohibited by law." And it provides that the *ticcadar* and *katkinadar* shall carry out the usual *ekhams* of the Civil and Criminal Courts ; that the *maliks*, *ticcadars* and *cultivators* shall have no connection with the same, that to pay the expenses incurred in boundary disputes is the concern of the *maliks*, the *ticcadars* and the *cultivators*, and that the *ticcadar* and *katkinadar* shall not cut down the fruit-bearing and non-fruit-bearing trees without the *parwana*

of the said maliks, the *ticcadars* and the cultivators. This document, therefore, clearly implies the existence of cultivators or tenants upon the land. So that it does not appear to us to have been intended to give the grantee or lessee the right to cultivate the land himself, but to have been intended to give him the right to cultivate some of it himself and to collect the rent of the remainder.

Similarly, the *kabuliat* of the 15th of April 1880, Exhibit III, contains clauses which appear to us to be perfectly inconsistent with the rights of grantees being rights of cultivating *raiya*s : because the plaintiffs conveyed by this document all the rights of proprietors, not only the right to cultivate the land, but the right to fisheries etc., the right to collect cesses, and "all other zemindari rights, save and except *brohmoter* etc., as aforesaid. Then it goes on to provide as follows : "If any fresh tax may be levied by Government in future and the *maliks* have to pay for the tenants, then I the *ticcadar* shall pay to the *maliks* to that extent and I shall collect that amount from the tenants." Then, it provides that the *ticcadar* shall not give shelter to thieves and *budmashes* within his properties. Now these appear to us to be clauses which usually occur in leases granted to tenure-holders, but not in leases granted to cultivating *raiya*s. The learned Judge has, therefore, we think misapprehended the terms of these documents, and this vitiates the conclusion at which he has arrived, namely, that the defendant, in respect of all the lands in suit, is a cultivating *raiya* with rights of occupancy.

The learned pleader for the respondent in this case contends that the District Judge has come to this conclusion, not upon the documents but upon the oral evidence in the case. But we are unable to take this view of the matter. The leases to which we have referred appear to us to be the principal evidence in the case with regard to the nature of the defendant's rights ; and the learned Judge has, we think, been influenced by them to a great extent and has not proceeded entirely upon the oral evidence in the case. Furthermore, the learned Judge has not come to any distinct finding as to whether the defendant is really an occupancy *raiya* in respect of the lands in his possession, other than the 15 *bighas*. What he says is that, inasmuch as he is clearly an occupancy *raiya* as regards the 5 *bighas*, therefore, under the provisions of section 21 of the Bengal Tenancy Act, he is an occupancy *raiya* in respect of all the lands held by him in the village. This may or may not be so. If the defendant is an occupancy or

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settled *raiya*t in respect of the 15 *bighas*, he is entitled to possession as an occupancy *raiya*t of the whole of the 41 *bighas* he holds in the village, *provided he holds them* (that is, the lands, other than the 15 *bighas*) *as a raiya*t. But if he holds them as a tenure-holder, his occupation of the 15 *bighas* as a *raiya*t will not give him the rights of a *raiya*t in the other lands.

This leads us to the consideration of the second point raised by the appellants' pleader, namely, whether the defendant, as proprietor of an indigo concern can claim to be an occupancy *raiya*t at all. The pleader for the appellants relies upon certain rulings which have been cited before us. The first of these, which is to be found in the case of *H. H. Cannan v. Kylash Chunder Roy Chowdhry* (1) lays down that "An indigo concern or firm has no corporate or legal existence, so far as the question of right of occupancy is concerned, which can only be recognized in particular individuals."

The next case upon which he relies is the case of *Rai Komul Dassee v. J. W. Laidley* (2) in which it is said that "A firm of capitalists, taking lease of lands from a zemindar and transferring their rights to the changing members of the firm cannot by any length of occupation acquire occupancy rights under section 6 of Act X of 1859 or the Bengal Act VIII of 1869."

These cases are undoubtedly clear authorities for the view he puts forward in the present case, namely, that the defendant, as proprietor of an indigo concern, cannot be an occupancy *raiya*t at all.

There is a third case, namely, that of *Laidley and others v. Gour Gobind Sarkar* (3) in which "A firm owning an indigo concern and carrying on the manufacture of an indigo, took in the collective names of Robert Watson & Co., a cultivating lease of certain lands which they held continuously for more than 12 years, the cultivation of these lands being carried on by the servants of the Firm and also by the sub-tenants." It was held in this case "that the lease must be taken to be a lease to the individuals who were at the time of the grant, members of the Firm and that *in the circumstances of the particular case* they had obtained an occupancy right."

But the facts of this case are perfectly different from those of the present case. In the case of *Laidley and others v. Gour*

(1) (1876) 25 W. R. 117.

(2) (1879) I. L. R. 4 Calc. 957.

(3) (1886) I. L. R. 11 Calc. 501.

Gobind Sarkar (1), it appears, the lease had been drawn up in the name of Robert Watson & Co., and the Judges who decided the case held that this lease must be interpreted as if there had been inserted in it the names of the persons who were members of the indigo concern at the time. Then, it was also held by the same Judges that there was nothing to show that the original grantees were no longer members of the partnership or indigo concern, that there was nothing to show that they were dead, or had transferred their interest to other persons, and that, it was not to be assumed that, according to the custom of the locality, occupancy rights acquired by 12 years' occupation could not be transmitted or transferred to persons subsequently admitted as members of the Firm. In these circumstances, it was held that the grantees of the original lease could be occupancy *raiyats* and that the defendants had occupancy rights.

These, however, are not the facts of the present case. It has not been alleged in this case that the indigo concern of which the defendant, M. H. Mackenzie, is proprietor, has any corporate existence; and, however that may be, the leases were never granted to any corporate body or to any indigo concern. The first lease was granted to Charles Swayne and Henry Thomson; the second to Henry Brown, muktear for William Thomson, the third to A. R. H. McQueen, muktear of W. S. Mackenzie; and the fourth to David Russel Crawford, muktear of John Francis Mackenzie. Now, it does not appear that the present defendant M. H. Mackenzie, is the assignee of any of these grantees. Nor is it alleged, far less proved, that occupancy rights in that part of the country are transferable by custom. It is now settled law that occupancy rights are not transferable save by custom, and assuming the rights of the grantees of these leases to be occupancy rights, before M. H. Mackenzie can acquire any rights under them, it must be shown that he is an assignee of these rights and that they are transferable by custom.

No doubt under section 20 clause (3) of the Bengal Tenancy Act, a person is also entitled to the rights of a settled *raiyat* in any land held as a *raiyat* by the person whose heir he is. But it is not alleged in this case that the present defendant, M. H. Mackenzie, is the heir of any of the grantees of these leases; so that even supposing that the rights of the grantees were occupancy rights, he can only resist the claim of the plaintiffs for ejectment, provided he can show that he is the assignee of

(1) (1886) I, L. R. 11 Calc. 501.

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the grantees and that the rights assigned to him are transferable by custom. This point, it has been said, is a new point, never taken in the Courts below. It appears to us that there is some truth in this contention although, no doubt, when the plaintiffs sue for ejectment of the defendant they are entitled to seek for ejectment upon any ground which is legal and valid. We, however, think that in the circumstances of the case, it will be more satisfactory and fairer to the parties to remand the case to the lower appellate Court to decide the issues of fact which arise in the case. These are, (i) whether the original grantees of the leases had occupancy rights in the land in dispute in this case, either before the grant of the first lease. or under any leases referred to, and (ii) if the grantees of the lands in dispute, had occupancy rights, then have these rights been transmitted to the present defendant and are the rights such as, according to the custom of the locality can be transmitted to the defendant?

If these issues be decided by the District Judge, upon remand in the affirmative then the suit must be dismissed. But if either of them is decided in the negative, the suit must be decreed.

There is one further contention raised by the learned pleader for the respondent, namely, that the plaintiffs have sued for the 10 *anna kist* of 1301 which is after the expiry of the term of the *ticca* lease. This appears to have been provided for in the last clause of the lease, Exhibit III, and it would appear that the plaintiffs according to this lease were entitled to rent up to the 10 *anna kist* of 1301.

The case is accordingly remanded to the District Judge for a decision on the issues above-mentioned. In deciding those issues, the District Judge will be at liberty to take such further evidence, as he may consider necessary.

Appeal from Appellate decree No. 2335 of 1898 is admittedly governed by this appeal (No. 2252). It will also be remanded to the lower appellate Court to be disposed of in accordance with the directions contained in this judgment.

The costs in both cases will abide the result.

B. M.

Case remanded.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

BHIKHAREE RAM MOHOORI

v.

DHAKESWAR PERSHAD NARAIN SINGH AND OTHERS*

AND

SHIBOO RAM MOHOORI

v.

DHAKESWAR PERSHAD NARAIN SINGH AND OTHERS.*

Ejectment, suit for—Landlord and tenant—Denial of relation and setting up third party as landlord in a previous rent suit by some of the landlords—Joint lessors, putting an end to tenancy—Transfer of Property Act (IV of 1882), section 111—Intention to determine.

A denial of the existence of relation of landlord and tenant and setting up a third party as landlord in a previous rent suit by some of the landlords amounts to renunciation of all by the tenant. The latter, therefore, incurs a liability to have his tenancy forfeited.

Though in England any joint tenant may put an end to his demise so far as it operates on his own shares, whether his companions join him in putting an end to the whole lease or not, yet according to the Indian decisions the relation created by the several joint landlords continues until there exists a new and complete volition to change it. This is the law when the *khās* possession is the relief asked for against the tenant but not in cases of trespassers and tenants when *khās* possession is not sought for.

Ebrahim Pir Mahomed v. Cursetji (1) referred to.

Faiz Dhali v. Aptabuddin (2) and *Ramgati Mohurur v. Pran Hari* (3) distinguished.

Where the relation of joint landlords continues, the tenancy of the lessees cannot be put an end to except by all the lessees acting together.

Under section 111 of the Transfer of Property Act, all the lessees must show their intention to determine the lease before they can succeed in a suit for ejectment.

Appeals by the Defendants first party.

Suit for ejectment from certain bazar land.

The facts and arguments appear sufficiently from the judgment.

Dr. Rash Behary Ghose and Babu Khetra Mohun Sen for the Appellants.

Babus Umakali Mukerji and Kulwant Sahay for the Respondents.

C. A. V.

* Appeal from Appellate Decrees No. 343 and 690 to 692 of 1905, against the decrees of W. H. Vincent, Esq., District Judge of Bhagnipur, dated the 6th February 1905, modifying those of Babu Mati Lal Halder, Subordinate Judge of Monghyr, dated the 19th August 1904.

(1) (1887) I. L. R. 11 Bom. 644.

(2) (1902) 6 C. W. N. 575.

(3) (1905) 8 C. L. J. 201.

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v.

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Narain Singh
and
Shiboo Ram
Mohoori

v.

Dhakeswar Pershad
Narain Singh.

The judgment of the Court was delivered by

Rampini J.—This is an appeal against a decision of the District Judge of Bhagulpore passed in a suit brought to eject the defendants from certain bazar land.

The plaintiffs are the owners of a 14 annas odd share of the land. The defendants third party are the owners of the remaining 1 anna odd share. The principal defendants are the occupiers of the land. The plaintiffs allege that the principal defendants in a rent suit denied their title as landlords, and set up the title of a third person. Hence the defendants have forfeited their rights as tenants, and so they (the plaintiffs) sue for *khas* possession of their share of the land.

The District Judge has given the plaintiffs a decree.

The defendant No. 1 appeals and on his behalf it has been urged (1) that all the plaintiffs were not parties to the previous rent suit; the defendants, therefore, only forfeited their rights of tenancy as regards the plaintiffs who were parties to that suit, (2) that all the co-owners in the land have not joined in this suit, and therefore the plaintiffs cannot succeed, and (3) that the plaintiffs asked for *khas* possession along with the defendants third party, and have been given a decree for joint *khas* possession along with the defendants first party.

It is true that in the previous rent suit all the present plaintiffs were not parties. But in that suit the principal defendants not only denied the existence of the relation of landlord and tenant between them and the then plaintiffs, but set up a third party as their landlord in respect of the disputed land. Hence, they renounced all the present plaintiffs as their landlords, and appear to have incurred a liability to have their tenancy forfeited.

The learned pleader for the appellants in support of his second plea draws attention to the terms of section 111 of the Transfer of Property Act, which is applicable to this case, as the land from which it is sought to evict the defendants is not agricultural land. He argues that a forfeiture is not incurred *ipso facto* by the renunciation of the plaintiffs as landlords, but must be followed by some act showing an intention on the part of the lessors to determine the lease, and he contends that this can only be done by all the lessors acting jointly and not by some of co-lessors, however, large their interest in the subject of the lease. In support of this contention he calls our attention to the cases of

Alum Monjee v. Ashad Ali (1), *Radha Proshad Wasti v. Esuf* (2), *Reasut Hossein v. Chorwar Singh* (3), *Harendra Narain Singh v. T. D. Moran* (4), *Golam Mohiuddin Hossein v. Khairan* (5), and *Ebrahim Pir Mahomed v. Cursetji Sorabji Devitre* (6). On the other hand, the respondent's pleader relies on the cases of *Kamul Kumari Chowdhurani v. Kiran Chandra Roy* (7), *Fayj Dhali v. Aftabuddin Sirdar* (8), *Ram Gati Mohurer v. Pran Hari Seal* (9), and *Ram Lochhi Koer v. H. Collingridge* (10).

We think the rule to be deduced from these cases is, as laid down in *Ebrahim Pir Mahomed v. Cursetji Sorabji Devitre* (6) that though in England any joint tenant may put an end to his demise, as far as it operates on his own share, whether his companions join him in putting an end to the whole lease or not, yet according to the Indian decisions the relation created by contract with several joint landlords continues until there exists a new and complete volition to change it. The rule is different in the case of trespassers, [*Radha Proshad Wasti v. Esuf* (2), *Harendra Narain Singh v. T. D. Moran* (4),] and also in the case of tenants, when *khas* possession is not sought for, [*Kamal Kumari Chowdhurani v. Kiran Chandra Roy* (7),] but this would seem to be the law, as settled in India in the cases of tenants, when *khas* possession is the relief asked for. In the cases of *Fayj Dhali v. Aftabuddin* (8), and *Ram Gati Mohurer v. Pran Hari Seal* (9), there was no question of co-lessors. There was apparently only one lessor. In *Ram Lochhi Koer v. Collingridge* (10) there was not one lease, but three leases, and on the determination of one of the leases, the lessor sued for partition, and *khas* possession, which she was certainly entitled to. But where the relation of joint landlords continues, it would seem the tenancy of the lessees cannot be put an end to except by all the lessors acting together. If in this case the tenancy had been determined by all the lessors, and the lessees deprived of their character of tenants, and reduced to that of trespassers, the plaintiffs would certainly, we think, have been entitled to the relief they asked for, but as the lessors (*i.e.*, all the lessors) have not in the terms of section 111, Transfer of Property Act, shown their intention to determine the lease, they cannot succeed.

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(1) (1871) 16 W. R. 138.

(2) (1881) 1, L. R. 7 Calc. 414.

(3) (1881) 1, L. R. 7 Calc. 470.

(4) (1887) 1, L. R. 15 Calc. at 40, (45, 46.)

(5) (1904) 1, L. R. 31 Calc. 786.

(6) (1887) 1, L. R. 11 Bom. 644.

(7) (1898) 2 C. W. N. 229.

(8) (1902) 6 C. W. N. 575.

(9) (1905) 3 C. L. J. 201.

(10) (1906) 5 C. L. J. 307.

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It would seem to be a hardship that the plaintiffs, who represent a 15 annas share of the lessors interest, should in consequence of the collusion of their one anna co-sharers with the principal defendants, be unable to obtain *khas* possession against the latter, but such would seem to be the effect of the Indian decisions and we must follow them.

We accordingly decree this appeal with costs.

This decision governs the other and analogous appeals, which are also decreed with costs.

A. T. M.

Appeals decreed.

CIVIL RULE.

Before Mr. Justice Brett and Mr. Justice Chitty.

SHEO SAHAI MAHTON

v.

KIRTARTH BHAGAT AND OTHERS*

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1908.

January, 2.

Appeal—Award, application to file, order refusing—Civil Procedure Code (XIV of 1882), section 525

An appeal lies against an order refusing to grant an application to file an award under section 525 of the Civil Procedure Code.

Ghulam Khan v. Muhammad Hassan (1) referred to.

Janokoy Nath Guha Roy v. Braja Lal Guha (2) followed.

Bhola v. Gobind Dayal (3), and *Katik Ram v. Babu Lal* (4) not followed.

Application by the Objector.

Application under section 525 of the Civil Procedure Code to file an award.

The facts of the case appear sufficiently from the judgment.

Babus Foy Gopal Ghosha and Roghu Nath Singh for the Petitioner.

Babus Umakali Mukerjee and Sashi Sekhar Bose for the Opposite party.

The judgment of the Court was as follows:

After hearing the learned vakils on both sides, we are of opinion that the Rule must be discharged.

It appears that the opposite party made an application under

* Civil Rule No. 2585 of 1907, against the decree of M. Smither, Esq., District Judge of Shahabad, dated the 8th May 1907, reversing that of S. N. Ahmad, Esq. Munsiff, First Court, Shahabad, dated the 14th September 1906.

(1) (1901) I. L. R. 29 Calc. 167.

(8) (1884) I. L. R. 6 All. 186.

(2) (1906) 8 C. L. J. 450; I. L. R. 33 Calc. 757.

(4) (1903) I. L. R. 26 All. 205.

section 525, Civil Procedure Code, in the Court of the Munsiff at Arrah and the Munsiff refused the application.

Thereupon there was an appeal to the District Judge who reversed the finding of the Munsiff and directed that the award should be filed and a decree drawn up in accordance with it.

The petitioner then applied to this Court and obtained a Rule on the opposite party to show cause why the order of the District Judge should not be set aside.

The grounds on which the Rule was obtained amounted in substance to one only, namely, that the decision of the District Judge could not be maintained, as under the law no appeal lay against the decision of the Munsiff under section 526 of the Code of Civil Procedure refusing to file the award.

We have been referred to different cases disposed of by this Court and to the case of *Ghulam Khan v. Muhammad Hassan* (1). In that case their Lordships of the Privy Council at page 184 express a distinct opinion that an order made on an application under section 526 disallowing the application would seem to be a decree within the meaning of section 2 of the Civil Procedure Code. This dictum of the Privy Council has been followed by this Court in the Full bench case of *Janokey Nath Guha Roy v. Brojolal Guha Roy* (2). The same view had been taken by this Court prior to the decision of the Privy Council in the case of *Mahomed Wahiduddin v. Hakimian* (3) and was adopted by the Madras High Court subsequent to the decision of the Privy Council in the case of *Ponnusami Mudali v. Mandi Sundara Mudali* (4). The opposite view has no doubt been taken by the learned Judges of the Allahabad High Court in the case of *Bhola v. Gobind Dayal* (5), and in the case of *Katik Ram v. Babu Lal* (6). The balance of authority is, however, clearly in favour of the view that in a case in which a Court has refused to grant an application to file an award under section 525 of the Code of Civil Procedure, an appeal does lie.

We, therefore, discharge the Rule with costs, the hearing-fee being assessed at three gold mohurs.

A. T. M.

Rule discharged.

(1) (1901) I. L. R. 29 Calc. 167.

(2) (1906) 3 C. L. J. 450.

(3) (1898) I. L. R. 25 Calc. 757.

(4) (1903) I. L. R. 27 Mad. 255.

(5) (1884) I. L. R. 6 All. 186.

(6) (1903) I. L. R. 26 All. 205

CIVIL.

1908.

Sheo Sahai Mahton
v.
Kirtarth Bhagat.

CRIMINAL REVISION.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

MOHESH CHANDRA SAHA AND ANOTHER

v.

KING EMPEROR.*

CRIMINAL.

1908.

January, 30.
February, 4.*Criminal Procedure Code (Act V of 1898), sections 350, 528—Transfer of Magistrate—Transfer of case—Trial, de novo.*

Section 350 of the Criminal Procedure Code applies not only where a Magistrate is transferred and ceases to exercise jurisdiction at the venue of the trial, but to all cases in which cases are transferred for whatever reason from the file of one Magistrate to that of another.

Queen-Empress v. Agnes (1) not followed.*Deputy Legal Remembrancer v. Upendra Kumar Ghose* (2) distinguished.

Rule obtained by the Accused.

Conviction under section 147 of the Indian Penal Code.

The material facts and arguments appear from the judgment.

Mr. Eardley Norton and Babus Dasarathi Sanyal and Sarat Chandra Basak for the Petitioners.*Mr. O'Kinealy (Advocate-General)* for the Crown.

C. A. V.

The following judgment was delivered by

February, 4.

Rampini J.—This is a Rule to show cause why the conviction and sentences in this case should not be set aside on the ground that after the case was transferred to the file of Babu Jagabundhu Ghose, that officer did not hold a *de novo* trial.

The petitioners have been convicted under section 147, Penal Code, Kechu Paramanik has been sentenced to one month's rigorous imprisonment, and Mohesh Chandra Saha to pay a fine of Rs. 100.

The case was originally on the file of Mr. G. S. Oddie who recorded the evidence of the witnesses for the prosecution. They were cross-examined before him and a charge was drawn up by him. He was then transferred. The District Magistrate took the case on his own file, under section 528, Criminal Procedure Code and transferred it to the file of Babu Jagabundhu Ghose, Deputy Magistrate. The accused did not claim a new trial. So Babu

* Criminal Rule No. 27 of 1908 against the decision of A. Bentinck, Esq., Joint Magistrate of Dacca dated the 23rd December 1907 affirming that of Babu Jagabundhu Ghose, Sub-Deputy Magistrate, dated the 25th November 1907.

(1) (1889) 9 All. W. N. 130.

(2) (1906) 12 C. W. N. 140.

Jagabundhu Ghose completed the trial and convicted the accused. They appealed to the Joint Magistrate, who on the 7th December ordered the Deputy Magistrate to examine two more witnesses. On the case coming before the Joint Magistrate for the second time, the appeal of the accused was dismissed. The day after the arguments in the case had been heard, the appellant's pleader cited the case of *Deputy Legal Remembrancer v. Upendra Kumar Ghose* (1), to the Joint Magistrate, and contended, that the proceedings of Babu Jagabundhu Ghose in not holding a *de novo* trial were illegal. Before us Mr. Norton has supported the Rule. The Advocate-General for the Crown has shown cause against it.

The contention of the Advocate-General is that the provisions of section 350, Criminal Procedure Code, apply both to cases of transfer of a case under section 528, Criminal Procedure Code, and to cases which after being begun by one Magistrate have to be completed by another, owing to the former Magistrate having left the District, when only, it is argued by Mr. Norton, he can be said to be succeeded by another Magistrate. The Advocate-General however replies that when a case is transferred under section 528 from the file of a Magistrate to that of another, the former ceases to have jurisdiction in the case, and is succeeded in the exercise of jurisdiction in the case by the other, just as if the former had been removed from the District and been succeeded in his office by the other.

In this case, Mr. Oddie was transferred from the District. The District Magistrate, however, passed an order under section 528, Criminal Procedure Code, transferring the case, no doubt because Mr. Oddie was an Assistant Magistrate and Babu Jagabundhu Ghose Deputy Magistrate, could not be said, strictly speaking, to succeed him in the office of Assistant Magistrate.

We consider the contention of the Advocate-General must prevail. We do not think that the provisions of section 350, Criminal Procedure Code, apply only to cases in which, Magistrates succeed each other in their offices. Magistrates subordinate to the District Magistrate rarely do so. Deputy Magistrates never succeed each other in their offices. But the terms of the section appear to us to apply to all cases in which cases are transferred for whatever reason from the file of one Magistrate to that of another. This is admitted in the case of *Deputy Legal Remembrancer v. Upendra Kumar Ghose* (1), in which Mitra and Holm-

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(1) (1906) 12 C. W. N. 140.

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wood, JJ., say : "The section, it seems to us, is capable of the interpretation that it covers all cases of change of trying Magistrates, whether on account of the first trying Magistrate being transferred to another district or on account of a transfer of a case under Chapter XLIV of the Code."

Further on, they observe : "The words of section 350 of the present Code are slightly different from the words of similar sections of the Codes of 1872 and 1882. The alteration might have been made with a view to include cases of transfer." They then conclude with this order : "Having regard to the general principle of interpretation that proviso and sub-clauses should be governed by the operative portion of the section, and to the fact that the general rule laid down in the earlier rulings have been recognised and approved of on more than one occasion since the amendment was made, we hold that Moulvi Abdus Samad acted irregularly in convicting the accused on evidence partly recorded by Mr. Oddie."

But the reasons for this order appear to us to be inconsistent, for the operative portion of section 350 expressly permits the conviction of an accused on evidence recorded, or partly recorded, by one Magistrate, who is succeeded by another ; while the earlier rulings referred to are no doubt in favour of the opposite view.

We observe further that the conclusion of the learned Judges who decided the case of *Upendra Kumar Ghose*, is only that Moulvi Abdus Samad acted irregularly, and for this reason they set aside the conviction. We presume they were of opinion that the irregularity, was one that had prejudiced the accused.

The earlier rulings referred to by Mitra and Holmwood, JJ., have been laid before us. They are *Purmessur Singh v. Soroop Audhikaree* (1), *Kopil Nath Sahi v. Koneeram* (2), *Raghoo Parirah* (3) and *Queen v. Hurnath Guho Thakurta* (4). But the first two of these rulings appear to us to be in favour of the view advocated by the learned Advocate-General. The case of *Raghu Parirah* is not in point. The only case in favour of the view contended for by Mr. Norton is that reported in 24 W. R. 53, alluded to in the judgment in the case of *Upendra Kumar Ghose*.

Then, as for the rulings in which the general rule laid down in this case has been recognised and approved of, since the altera-

(1) (1870) 13 W. R. Cr. 40.

(3) (1873) 19 W. R. 28.

(2) (1870) 14 W. R. 3.

(4) (1875) 24 W. R. Cr. 52.

tion in the wording of the corresponding section of the Code of 1872, the only case exactly in point which Mr. Norton cites is that of *Queen Empress v. Augnee* (1), which, is the decision of a single Judge of the Allahabad High Court, and accordingly is not binding on us.

He also calls attention to *Queen Empress v. Bashir Khan* (2) and *Damri Thakur v. Bhowani Sahoo* (3). In the former of these, the accused expressly prayed for a *de novo* trial, and as the Magistrate did not accede to their request, the conviction of the accused was rightly set aside. The latter case is not in point and need not be considered.

We are, therefore, of opinion that we are free to follow the interpretation which in our opinion should be put on the terms of section 350, Criminal Procedure Code, and which Mitra and Holmwood, JJ., admit the section is capable of having put on it, *viz.*, that it applies to all instances of transfer of a case, for whatever reason the transfer may be made.

We have been pressed, if we take this view, to refer the question for the decision of a Full Bench. But looking at the terms of the order in the case of *Upendra Kumar Ghose, viz.*, that Moulvi Abdus Samad acted irregularly in convicting the accused on evidence partly recorded by Mr. Oddie, which lays down no general rule, and which must have proceeded on the principle that the irregularity had prejudiced the accused, which is not shown to have been the case in the present instance, we do not think we need or could do so.

We, accordingly, discharge the Rule. The petitioner who has been sentenced to imprisonment must be relegated to jail to undergo the remainder of his term.

N. K. B.

Rule discharged.

(1) (1889) 9 All. W. N. 130.

(2) (1892) I. L. R. 14 All. 346.

(3) (1895) I. L. R. 23 Calc., 194.

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Mohesh Chandra
Shaha

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APPELLATE CIVIL.

CIVIL.

1908.

January, 23, 24.

February, 10.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

GOBINDA CHANDRA PAUL AND OTHERS

v.

DWARKA NATH PAUL AND OTHERS.*

Compromise decree made in a suit for money—Minor—Court, sanction of—Decree directing immoveable properties hypothecated for realization of the money—Suit for realization of balance by sale of properties mentioned in decree—Decree directing lien on immoveable property, if void—Registered instrument, if necessary—Registration Act (III of 1877), section 17—Transfer of Property Act (IV of 1882), sections 58, 59, 100—Mortgage and Charge, difference between the two—Civil Procedure Code (XIV of 1882), section 375—Suit, nature and scope of.

The provisions of section 17 of the Registration Act (III of 1877), do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or of orders made by Court when registration would be otherwise necessary.

Binderri Naik v. Ganga Saran Sahu (1) and *Pranal Annee v. Lakshmi Annee* (2) followed.

Raghubans Mani Singh v. Mahabir Singh (3), *Patha Muthammal v. Eup Rowther* (4) and *Gupta Narain Das v. Bejoya Sundari Debya* (5) referred to.

The question whether any particular term of a petition of compromise incorporated in a decree, made under the power given by section 375 of the Code of Civil Procedure, relates to the suit or is covered by its subject matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts.

A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject matter of the suit and contains other conditions; if these other conditions are the considerations for the compromise of the subject matter of the suit, they must be incorporated in the decree.

Pranal Annee v. Lakshmi Annee (2), *Raghubans Mani Singh v. Mahabir Singh* (3), *Jasimuddin Biswas v. Bhudan Jolani* (6) *Gupta Narain Das v. Bejoya Sundari Debya* (5), and *Purna Chandra Sarkar v. Nil Madhub Nandy* (7), referred to.

* Appeal from Original Decree No. 264 of 1906 against a decree of Babu Pramatha Nath Chatterjee, Subordinate Judge of Chittagong dated the 17th April 1906.

(1) (1897) L. R. 25 I. A. 9.

(2) (1899) L. R. 26 I. A. 101.

(3) (1905) I. L. R. 28 All. 78.

(4) (1906) I. L. R. 29 Mad. 365.

(5) (1897) 2 C. W. N. 663.

(6) (1907) I. L. R. 84 Calc. 456.

(7) (1901) 5 C. W. N. 485.

Bir Bhadra Rath v. Kalpataru Panda (1) and *Gurdeo Singh v. Chandrikah Singh* (2) distinguished.

Muthayya v. Venkata Rutnam (3) explained.

The Transfer of Property Act contemplates a difference between mortgages and charges, though, no doubt, the mode of granting relief and the nature of the relief that may be granted are similar, because a decree for sale is the only relief that may be granted for the enforcement of a charge.

A mortgage is a transfer of an interest in specific immoveable property ; a charge only secures payment of money out of that property. Either may be created by act of parties, but when the "transaction does not amount to a mortgage," and does not therefore operate as a transfer, it is a charge on immoveable property. A document which only gives a right to payment out of a particular property without transferring it, creates a charge.

Tancred v. Delagoa Bay and East Africa Railway Co. (4) *Burlinson v. Hall* (5) referred to.

If an instrument is expressly stated to be a mortgage and gives the power of realization of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not, on the face of it a mortgage, but simply creates a lien, or directs the realisation of money from a particular property, without reference to sale, it creates a charge.

Tancred v. Delagoa Bay (4) referred to.

Appeal by the Plaintiffs.

Suit for the recovery of a sum of money, being the balance due on a compromise decree and for sale of the properties specified in the schedule to the decree as hypothecated properties.

The facts of the case appear from the judgment.

Babus Dwarka Nath Chakravarti and *Akshay Kumar Banerjee* for the Appellants.

Babus Basanta Kumar Bose, *Pravas Chandra Mitter* and *Khetra Mohan Sen* for the Respondents.

C. A. V.

The judgment of the Court was delivered by

Mitra J.—The facts are not disputed. In 1898 the plaintiffs instituted a suit against the defendants 1 to 4 for recovery of Rs. 36,882-2-5 due on *bahikhata* accounts. The defendants pleaded non-liability. The parties, however, ultimately came to terms and the terms of the compromise were stated in a petition to the Court ; one of the defendants was a minor and the Court was necessarily asked to give permission to the compromise. On the 28th July 1898, the Court gave the permission sought for and a decree was made to the following effect,

(1) (1905) 1 C. L. J. 388.

(3) (1901) I. L. R. 25 Mad. 553.

(2) (1907) 5 C. L. J. 611.

(4) (1889) 23 Q. B. D. 289.

(5) (1884) 12 Q. B. D. 347.

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namely: "The defendants do pay to the plaintiffs the sum of Rs. 31,257-0-3 pies together with interest at 6 per cent. per annum in instalments of Rs. 500 per mensem but on default of payment of two instalments, the whole amount with interest at the aforesaid rate will be realisable at once." According to the agreement of the parties as contained in the said petition of compromise, the decree further declared that "the immovable properties specified therein shall be hypothecated for the realisation of the said money and that the defendants shall not be able to create any encumbrance on the same."

A part of the debt covered by the decree was realised by execution. For the recovery of the balance, *i.e.*, Rs. 29,591-2-9 the plaintiffs instituted the present suit under the provisions of the Transfer of Property Act and asked for sale of the properties specified in the schedule to the decree (made on the 28th July 1898) as hypothecated properties. They impleaded defendant No. 5 in the suit by reason of his having taken possession of some of the hypothecated properties after their decree, and defendants 6 to 11 as subsequent attaching creditors.

The present suit was contested by defendants Nos. 1, 5, 6, 7, 8, 9, 10 and 11 on various pleas which were all overruled by the lower Court, and on the 17th April 1906, a decree was passed in favour of the plaintiffs in accordance with their principal prayer in the plaint, under the provisions of the Transfer of Property Act, for sale of the hypothecated properties. The defendants 1, 5, 6, 7, 8, 9, 10 and 11 have appealed from this decree.

The only contention raised before us is that the decree of the 28th July 1898 was void and of no effect in so far as it purported to create a lien on immovable property. The following in substance, are the arguments addressed to us by the learned vakil for the appellants: (1) that no mortgage or hypothecation of immovable property such as is alleged in this case could be effected without a duly registered instrument or contrary to the provisions of section 17 of the Indian Registration Act and section 59 of the Transfer of Property Act, (2) that the decree of the 28th July 1898 was made in a suit for recovery of a simple money debt and the hypothecation of immovable property for recovery of such debt was beyond the scope of that suit, and that the said decree, so far as it provided for hypothecation, cannot be regarded as properly a part of it, and (3) that the distinction made in this case by the lower Court between a mortgage and a charge is without a difference.

The first argument overlooks the exception in clause (i) of section 17 of the Indian Registration Act which excepts decrees and orders of Courts and awards from the rule as to compulsory registration of documents. In *Bindesri Naik v. Ganga Saran Sahu* (1), the Judicial Committee of the Privy Council declared that the provisions of section 17 of the Registration Act do not apply to proper Judicial proceedings, whether consisting of pleadings filed by the parties or of orders made by Court when registration would be otherwise necessary. The same view was expressed by their Lordships in *Pranal Annee v. Lakshmi Annee* (2). The High Courts at Allahabad and Madras, respectively, followed this view in *Raghubans Mani Singh v. Mahabir Singh* (3) and in *Patha Muthammal v. Esup Rowther* (4). This Court took the same view in *Gupta Narain Das v. Bijoya Sundari Debya* (5).

Section 59 of the Transfer of Property Act lays down a rule for the registration of mortgages as defined in section 58 of the Act, and if, as we shall presently show, a charge as contemplated in section 100 of the Act is distinguishable from a mortgage, the absence of the formalities required by section 59 would not bar the relief which may be obtained under section 100. In this view of the decree so far as it related to hypothecation of immovable property it could not be regarded as a mortgage, it might, under certain circumstances be dealt with as an instrument creating a charge.

The learned vakil for the appellants, however, laid great stress on the second head of his contention. He relied, mainly, on certain observations contained in the decisions of this Court in the cases of *Birbhadra Rath v. Kalpataru Panda* (6) and *Gurdeo Sing v. Chandrikah Singh* (7). The question whether any particular term of a petition of compromise incorporated in a decree, made under the power given by section 375 of the Code of Civil Procedure, relates to the suit or is covered by its subject matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule

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(1) (1897) L. R. 25 I. A. 9.

(2) (1899) L. R. 26 I. A. 101.

(3) (1905) I. L. R. 28 All. 78

(4) (1906) I. L. R. 29 Mad. 365.

(5) (1897) 2 C. W. N. 663.

(6) (1905) 1 C. L. J. 388.

(7) (1907) 5 O. L. J. 611.

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can be laid down, each case being governed by its own facts. The cases cited before us, *Birbhadra Rath v. Kalpataru Panda* (1) and *Gurdeo Singh v. Chandrikah Singh* (2), turn on their own facts, and those facts are clearly distinguishable from the facts of the present case. We have carefully examined the judgments in the cases relied on and are unable to apply them to the facts with which we are now dealing. On the other hand, in *Pranal Annee v. Lakshmi Annee* (3) already cited, Lord Watson, in delivering the judgment of the Privy Council, said, with reference to property not covered by the decree but which was the subject of an agreement which led to a decree by consent of parties,—“If the parties after agreeing to settle the suit of 1885 on the footing that they were each to take a half share of the lands involved in that suit and also a half share of the lands now in dispute had informed the learned Judge that these were the terms of the compromise and had invited him by reason of such compromise to dispose of the conclusions of the suit of 1885, their Lordships see no reason to doubt that the order of the learned Judge, if it had referred to or narrated these terms of compromise, would have been judicial evidence available to the appellant that the respondents had agreed to transfer to her the moiety of land now in dispute.” (see in this connection, also *Raghubans Mani Singh v. Mahabir Singh* (4).

In *Jasimuddin Biswas v. Bhuban Jelini* (5), Brett and Sharfuddin JJ. recognised the binding effect of the term in a decree which was the consideration for the relief granted in a suit as decreed on agreement of parties. The same view was taken in *Gupta Narain Das v. Bejoya Sundari Debya* (6) and *Purna Chandra Sarkar v. Nilmadhab Nandi* (7). In the latter case, Ghose and Pratt. JJ. held that a decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject matter of the suit and contains other conditions and that if those other conditions are the considerations for the compromise of the subject matter of the suit, they must be incorporated in the decree.

In the present case the hypothecation of immoveable property in the consent decree was the consideration for the time allowed for payment of the sum decreed by instalments, and which covered a period of over five years. It was an integral and

(1) (1905) 1 C. L. J. 388.

(2) (1907) 5 C. L. J. 611.

(3) (1899) L. R. 26 I. A. 101.

(4) (1905) 1 L. R. 28 All. 781.

(5) (1907) 1 L. R. 34 Calc 456.

(6) (1897) 2 C. W. N. 663.

(7) (1901) 5 C. W. N. 486.

necessary part of the adjustment of the claim in the suit, for without it there would have been no compromise. In our opinion, such a hypothecation was properly inserted in the consent decree, and we cannot hold that the Court acted against the provisions of section 375 of the Code in allowing its insertion.

Muthayya v. Venkata Rutnam (1), cited before us by the learned vakil for the appellants, does not militate against the view we take. In that case no decree was drawn up, the suit having been withdrawn and so the question now argued before us did not arise.

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Thirdly, as regards the distinction between a mortgage and a charge, we observe that the Transfer of Property Act refers to mortgages which are defined in section 58 and to charges which are defined in section 100. The Act obviously contemplates a difference between mortgages and charges though no doubt the mode of granting relief and the nature of the relief that may be granted are similar because a decree for sale is the only relief that may be granted for the enforcement of a charge. A mortgage is a transfer of an interest in specific immovable property, a charge only secures payment of money out of that property. Either may be created by act of parties but when "the transaction does not amount to a mortgage," and does not therefore operate as a transfer, it is a charge on immovable property. A document which only gives a right to payment out of a particular property without transferring it has been held to create a charge; *Tancred v. Delagoa Bay and East Africa Railway Co.* (2), *Burlinsan v. Hall* (3).

The distinction between a mortgage and a charge is keenly appreciated by an English lawyer, though the inclusion of simple mortgages in the definitions given in section 58 of the Transfer of Property Act has somewhat obliterated the distinction in India. The result has been a divergence of opinion between the High Courts; *Khemji Bhagvandas Gujar v. Rama* (4), *Motiram v. Vitai* (5), *Rangasami v. Muttukumarappa* (6), *Nabin Chand Naskar v. Raj Coomar Sarkar* (7) and *Pran Nath Sarkar v. Jadu Nath Shaha* (8) and *Kishan Lal v. Ganga Ram* (9). A charge which owes its existence to the operation of law may be easily discovered, such as a rent charge. A charge created for

(1) (1901) I. L. R. 25 Mad. 553.

(2) (1889) 23 Q. B. D. 239.

(3) (1884) 12 Q. B. D. 347.

(7) (1906) 9 C. W. N. 1001.

(8) (1906) 9 C. W. N. 697; I. L. R. 32 Calc. 729.

(9) (1890) I. L. R. 13 All. 28.

(4) (1886) I. L. R. 10 Bom. 519.

(5) (1888) I. L. R. 13 Bom. 90 at 97.

(6) (1887) I. L. R. 10 Mad. 509.

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payment of a legacy or annuity or maintenance money by a will or trust deed is not difficult to distinguish from a mortgage, but the difficulty that arises in cases of lien created by other act of parties, especially for payment of debts, must be solved in each case from the terms and expressions used in the instruments creating them and the formalities actually observed in execution. If an instrument is expressly stated to be a mortgage, and gives the power of realisation of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not on the face of it a mortgage, but simply creates a lien, or directs the realisation of money from a particular property, without reference to sale, it creates a charge ; *Tancred v. Delagoa Bay* (1).

The decree under construction in the present case, has, little resemblance in form to a simple mortgage, the hypothecation clause creates a lien and prohibits further encumbrances. The parties only intended that the immovable properties mentioned in the schedule to the decree should be reserved in fact as security for payment of the money directed to be paid under the decree.

We are, therefore, of opinion that the decree made by the lower Court is correct, and we accordingly dismiss this appeal with costs.

B. M.

Appeal dismissed.

(1) (1889) 23 Q. B. D. 239.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

ICHARAM SINGH

v.

NILMONY BAHIDA.*

CIVIL.

1908.

January, 10, 14, 17.

Jurisdiction—Central Provinces Rent Law (Act IX of 1883), section 43—Central Provinces Tenancy Act of 1898, sections 45 clause (3), 47—Occupancy holding, transfer of part of—Limited interest—Adverse possession.

When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court.

Bhandi Singh v. Ramadhin Rai (1) followed.

When a transfer of occupancy holding was effected without the consent of the landlord at a time when the rent law in force was Act IX of 1883 as amended by Act XVII of 1889, the Civil Courts have jurisdiction to entertain a suit for ejectment. But it is otherwise after the passing of the Central Provinces Tenancy Act of 1898.

Chatter Singh v. Narayan (2), *Kasiram v. Behari* (3), *Narain Das v. Gulab Chand* (4) and *Chandrabhan v. Deo Chand* (5) referred to.

The change made in the law in this respect in 1898 is not of procedure only; it affects substantive rights.

Section 43 of the Tenancy Act of 1883 refers to transfers of entire holdings and not of a portion only. So long as the original tenancy subsists, the landlord has no right to re-enter and oust the persons, who are in the land by license from the tenant.

Chatter Singh v. Narayan (2) referred to.

The possession of a limited interest in immovable property may be just as much adverse for the purpose of passing a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property: but such adverse possession of a limited interest though a good plea to a suit for ejectment, is good only to the extent of that interest: the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it, there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted.

Ishan Chunder Mitter v. Ramranjan Chakrabutty (6) followed.

Appeal by the Defendant

Suit for recovery of possession.

The facts of the case and arguments appear sufficiently from the judgment.

* Appeal from Appellate Decree No. 455 of 1906, against the decree of Mr. Tarachand, District Judge of Sambalpur, dated the 20th December 1905, reversing that of Mr. N. Ghose, Munsiff of Sambalpur, dated the 26th September 1905.

(1) (1905) 2 C. L. J. 359.

(2) (1899) 8 C. P. L. R. 70.

(3) (1884) 4 C. P. L. R. 40.

(4) (1884) 4 C. P. L. R. 59.

(5) (1890) 4 C. P. L. R. 172.

(6) (1905) 2 C. L. J. 125.

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Icharam Singh

v.
Nilmony Bahida.*Babu Bepin Chandra Mullik* for the Appellant.*Babus Satis Chandra Ghosh and Anilendra Nath Roy Chowdhury* for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—The circumstances, which have given rise to the litigation out of which this appeal arises, are not disputed before this Court. One Padman was an occupancy tenant under the plaintiff respondent, in respect of an agricultural holding in the district of Sambalpur. On the 17th march, 1892, the defendant appellant purchased from Padman the disputed land, which forms a portion of the occupancy holding, entered into occupation and since then has been in possession by cultivation. On the 15th may 1905, the plaintiff commenced this action for recovery of possession upon the allegation that the transfer did not create any valid right in the appellant and that he must consequently be treated as a trespasser. The defendant resisted the claim on the grounds that the transfer had been effected with the consent of the predecessor of the plaintiff, who was at that time the landlord, that subsequently the transfer had been recognised by continuous acceptance of rent, and, that, if the plaintiff was not prepared to recognise the validity of the transfer, his claim to ejectment was barred by limitation. The Court of first instance found that the transfer had not been effected with the consent of the then landlord but that there had been a subsequent recognition by receipt of rent. In this view of the matter, the Munsiff dismissed the suit. Upon appeal, the District Judge held that the landlord had not at any time received rent from the transferee and that consequently the defendant had not acquired the status of a tenant. Accordingly, the District Judge allowed the appeal and made a decree for ejectment in favour of the plaintiff. The defendant has now appealed to this Court, and, on his behalf, the decision of the District Judge has been assailed, substantially, on two grounds, *namely, first*, that under section 45, clause 3 and section 47 of the Central Provinces Tenancy Act of 1898, the Civil Court had no jurisdiction to entertain an action for ejectment on the ground that the transfer had been effected without the consent of the landlord, and, *secondly*, that upon the facts found, the claim for recovery of actual possession was barred by limitation.

In support of the first branch of this contention, the learned vakil for the appellant has contended that, as section 46, sub-

section 3 prohibits the transfer of an occupancy holding either in whole or in part and makes the transfer voidable at the instance of the landlord, the procedure laid down in section 47 for recovery of possession must be followed by the landlord. This contention appears to us to be clearly well founded and is supported by the provisions of section 95, which shows that the jurisdiction of Civil Courts is barred in cases in which Revenue Officers are authorised to take cognizance under the Act. This is consistent with the elementary principle that when statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Courts; *Bhandi Singh v. Ramadhin Rai* (1). The view we take of the effect of section 47, is further supported by the decisions of the Court of the Judicial Commissioner of the Central Provinces in the cases of *Dayaram v. Saligram* (2), *Chamru v. Tulsidin* (3) and *Daji v. Moreshwar* (4). In answer to this argument, the learned vakil for the respondent contended, *first*, that, as this question was not raised in the Courts below, the point ought not to be allowed to be taken in this Court, and, *secondly*, that as in the case before us, the transfer in question took place in 1892, the provisions of the Central Provinces Tenancy Act of 1898 have no application. The first branch of this contention is manifestly untenable. The objection taken relates to the jurisdiction of the Court and, if, as the appellant contends, there was an inherent absence of jurisdiction, the objection may be taken at any stage of the proceeding. The second branch of the contention, however, must prevail, as already observed, the transfer, the validity of which is impeached, took place in 1892. The Rent Law then in force in the Central Provinces was contained in Act IX of 1883 as amended by Act XVII of 1889. The provisions of section 43 of the Tenancy Act of 1883 made a transfer of an occupancy holding void as against the landlord and there was no remedy provided by the Act for recovery of possession through the machinery of the Revenue Courts. It was consequently held in a series of cases decided in the Court of the Judicial Commissioner of the Central Provinces that the Civil Courts had jurisdiction to deal with the matter and to entertain a suit for declaration, if after an attempted invalid alienation, the tenant

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(1) (1906) 2 C. L. J. 359.

(3) (1904) 17 C. P. L. R. 49.

(2) (1903) 16 C. P. L. R. 135.

(4) (1905) 1 Nag. L. R. 112.

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still continued in occupation (as in the case of mortgages without possession), or to entertain a suit for ejectment, if the tenant, at the time of or after alienation parted with possession of his holding; *Chatter Singh v. Narayen* (1) *Kasiram v. Behari* (2), *Narain Das v. Gulab Chand* (3) and *Chandrabhan v. Deochand* (4). It follows, consequently, that, when the transfer took place in 1892, the plaintiff landlord acquired a right to sue the appellant in the Civil Court. Can it be successfully contended that this right was taken away by the provisions of the Tenancy Act of 1898? In our opinion, the question must be answered in the negative. The change, which was made in the law in this respect in 1898, was not one of procedure only, the privileges of the landlord were materially curtailed and if we were to give retrospective operation to the new Act in this respect, the result would be to affect the substantive rights already acquired, when the repealed Act was in force. We must, consequently, hold that the matter in controversy before us, must be tested by the provisions of section 43 of the Tenancy Act of 1883 and not by those of section 47 of the Tenancy Act of 1898. This view is supported by the decision in the case of *Kala Tehari v. Narain* (5). This conclusion, however, necessarily raises the question as to the effect of section 43 of the Tenancy Act of 1883. That section merely declares that a transfer of an occupancy holding is void as against the landlord, unless it is made with his consent. This refers obviously to transfer of entire holdings. It does not lay down that a transfer of a portion only of an occupancy holding is void or entitles the landlord to exercise his right of re-entry either as regards the entire holding or the portion transferred. As pointed out in the case of *Chatter Singh v. Narain* (1) so long as the original tenancy subsists, the landlord has no right to re-enter and oust the persons, who are on the land by license from the tenant; the transfer may not be binding upon the landlord and he may not be obliged to recognise it, but so long as the original tenancy continues, the landlord has clearly no right of re-entry, for so long as the tenancy intervenes, he is not brought into direct relationship with the transferee. The same view was taken in the cases of *Govinda Das v. Madho Prosad* (6) and *Tara Chand v. Sambha* (7). Reference may also be made to the analogous principle now well-settled as applicable to cases under

(1) (1889) 3 C. P. L. R. 70.

(4) (1890) 4 C. P. L. R. 172.

(2) (1884) 4 C. P. L. R. 49.

(5) (1900) 13 C. P. L. R. 143.

(3) (1884) 4 C. P. L. R. 59.

(6) (1888) 3 C. P. L. R. 9.

(7) (1892) 6 C. P. L. R. 49.

the Bengal Tenancy Act, namely, that the sale of or parting with a portion of an agricultural holding is not a ground for forfeiture, so that, where a tenant has transferred a portion of his holding but continues in possession of the remainder and pays the entire rent, neither he nor the transferee is liable to be ejected (*Kabil Sardar v. Chunder Nath Nag Chowdhry*(1)). It was pointed out however, on behalf of the respondent that, in the case before us, since the transfer by the original tenant, the landlord has accepted from him a reduced rent ; but, in our opinion, this circumstance is of no assistance to the respondent ; the effect of a mere acceptance of reduced rent by the landlord does not clearly extinguish the original tenancy, nor does it amount to the creation of a new tenancy.

We must consequently hold that under section 43 of the Central Provinces Tenancy Act of 1883 the present plaintiff has acquired no right to eject the defendant from that portion of the holding which he purchased in 1892 and of which he has since that date continued in occupation. It follows accordingly that, although the first contention of the appellant, namely, that under section 47 of the Tenancy Act of 1898 the Civil Court has no jurisdiction to entertain the present suit, must be over-ruled, the respondent successfully meets this objection only upon a ground which establishes that he has no cause of action on the basis of which he can claim any relief.

The second point taken on behalf of the appellant raises the question, whether the suit is barred by limitation. It has been found concurrently by the Courts below that the appellant entered into occupation in 1892 and has since then been in possession by cultivation of the land. The Courts below have, however, over-ruled the plea of limitation on the ground that, as the defendant pleads a tenancy, there can be no adverse possession and that consequently the claim for recovery of actual possession by ejectment of the defendant is not barred by limitation. This view is, in our opinion, erroneous and cannot be supported. As was pointed out by this Court in the case of *Ishan Chandra Mitter v. Raja Ramranjan Chakrabutty* (2) possession of a limited interest in immoveable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property ; but such adverse possession of a limited interest, though a good plea to a

(1) (1892) I. L. R. 20 Calc. 590.

(2) (1905) 2 C. L. J. 125.

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suit for ejectment, is good only to the extent of that interest, the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it ; there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted. It is obvious therefore that, although the defendant has not set up an absolute title for the statutory period and has not consequently acquired by adverse possession, such absolute title, he has yet acquired by prescription the limited interest which he has set up, namely, the interest of a tenant. It, consequently, follows that it is too late for the plaintiff landlord now to seek to eject the defendant as a trespasser ; his title to recover actual possession is barred, although his title to receive rent has not been extinguished. The second branch of the contention of the appellant must, therefore, be supported.

The result is that this appeal must be allowed, the decree of the District Judge reversed and that of the Court of first instance restored. The suit will stand dismissed with costs in all the Courts.

A. T. M.

Appeal decreed.

Before Mr. Justice Brett and Mr. Justice Woodroffe.

MAHABIR TEWARI AND OTHERS

v.

PURBHOO NATH CHOWBEY AND ANOTHER.*

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November, 11, 12,
13, 20.

Civil Procedure Code (Act XIV of 1882), Sec. 13, Expl. II—Res Judicata
—‘Ought’ to have been made a ground of defence.

The defendants were the proprietors of the entire village Sajiball.

In execution of a Small Cause Court decree obtained against them by the father of plaintiffs Nos. 5, 6, 7 and the brothers of the other plaintiffs, the entire village was sold on the 7th May 1890 and purchased by the decree-holder.

Subsequently, an ancestor of the plaintiffs brought a mortgage suit against defendants 2, 3, and 4, obtained a decree and in execution thereof purchased 49½ bighas of land in the village on the 3rd January 1897.

On the 30th September 1899, defendants 2, 3 and 4 brought a suit to have the Small Cause Court decree and sale thereunder set aside.

On the 18th January 1900, they brought another suit to have the mortgage decree and sale set aside. This suit was dismissed for default. The first suit was decreed and the Small Cause Court decree and sale set aside.

* Appeal from Appellate Decree No. 169 of 1906 against the decision of M. Smither, Esq., District Judge of Shahabad, dated the 4th January 1906, reversing that of Babu Nistarun Banerjee, Subordinate Judge, dated the 10th July 1905.

Plaintiffs applied under the Land Registration Act to have their names registered as proprietors of 49½ bighas, and on their application being refused by the Collector and Commissioner, brought the present suit, which was resisted on the ground that in their defence to the suit to have the Small Cause Court decree set aside, they ought to have put forward their purchase under the mortgage decree and they having failed so to do, their suit was barred by the operation of Expl. 2 to section 13 of the Civil Procedure Code :

Held, the suit was not barred.

Per Brett J. :—As the two causes of action were not and could not have been joined by the defendants in the same suit, it was not obligatory upon the plaintiffs to make their claim under the mortgage decree a ground of defence in the suit to have the other decree set aside.

Suit to have the names of the plaintiffs registered under the Land Registration Act.

Appeal by the Plaintiffs.

The facts and arguments appear sufficiently from the judgment of Brett J.

Babus Umakali Mukherji and Makhan Lal for the Appellants.

Mr. O'Kinealy (Advocate-General) with Babus Raghunath Singh and Chandra Sekhar Prasad Singh for the Respondents.

C. A. V.

The following judgments were delivered :

Brett J.—The present appeal arises out of a suit brought by the present plaintiffs appellants to have their right declared in 49½ bighas of land in village Sajiball, and to have their names registered in the Collectorate as proprietors of those 49½ bighas. It appears that they had applied in the Land Registration Department of the Arrah Collectorate in July 1903 to have their names registered as proprietors of this property claiming title as purchasers in execution of a mortgage decree at a sale held on the 3rd January 1897. The Deputy Collector allowed the application but on appeal the order of the Deputy Collector was set aside by the Collector of Arrah, and the decision of the Collector was confirmed by the Commissioner of the Division on the 18th June 1904.

The only point urged in defence which is of importance for the purpose of this appeal was that the plaintiffs were barred by the doctrine of *res judicata* under the provisions of section 13 Exp. (2) of the Code of Civil Procedure. The explanation runs as follows : "Any matter which might and ought to have been ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

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Brett, J.

The plaintiffs appellants all form members of one family of Tewaries descended from one Mussummut Bihansa Koer and her husband Hanker Singh Tewari. The defendants on the other hand are members of a family of Singhs descended from Mussammut Lachminia Koer and her husband Babu Bhagwan Singh.

On the 1st March 1888, a suit was brought by Shesbaran Tewari, the father of plaintiff Nos. 5, 6 and 7, and the brother of the other plaintiff, in the Small Cause Court against Mohabir Singh and Budhan Singh, the father of defendants 4, 2 and 3 on a bond for Rs. 100 said to have been executed by these two persons in favour of Shesbaran Tewari, on the 8th July 1840. An *ex parte* decree was obtained on the 21st March 1888 and in execution of the same, the decree-holder Sheobaran Singh sold the whole village Sajiball on the 7th May 1890 and purchased it himself.

On the 2nd May 1884 a mortgage bond for Rs. 1,000 is said to have been executed in favour of Bihansa Koer, ancestors of the plaintiffs, by the predecessor of defendants 2 to 4 by which 49½ bighas of Mouza Sajiball were hypothecated as security for the debt. A suit was instituted in 1889 (No. 91 of 1889) by Bihansa Koer against the present defendants 2, 3 and 4, and a decree was obtained on the 27th February 1890. The defendants appealed, but their appeal was dismissed on the 7th October 1890. On the 3rd January 1897 the mortgaged property was sold and purchased by the decree-holder Bihansa Koer.

On the 30th September 1899, a suit was brought by the present defendants 2, 3 and 4 to have set aside the *ex parte* Small Cause Court decree of the 21st March 1888 and the sale under that decree held on the 7th May 1890 on the ground that the bond and the proceedings based on that bond were fraudulent.

On the 13th January 1900, the same defendants brought another suit to have the mortgage decree of the 27th February 1890 and the sale under that decree of the 3rd January 1897 set aside on the ground that the mortgage bond and the proceedings based on that bond were fraudulent. This latter suit was dismissed for default on the 7th May 1901. Bihansa Koer, it is to be observed, had died in January or February 1901.

The suit to set aside the Small Cause Court decree and the sale thereunder was decreed in favour of the then plaintiffs, the present defendants 2, 3 and 4 on the 20th December 1900, and that decision was affirmed on appeal on the 12th June 1903.

The present suit was instituted on the 27th September 1904 and the main ground of defence taken by the defendants was that the plaintiffs were not entitled to succeed in the suit because they had failed in their defence in the suit instituted on the 30th September 1899 to set aside the Small Cause Court decree, to set up the title under which in the present suit the plaintiffs seek to have their right declared in the 49½ bighas of land in mouzah Sujibal.

The Subordinate Judge decreed the plaintiffs' suit, but on appeal the District Judge set aside the judgment and decree of the Court of first instance and dismissed the plaintiffs' claim on the ground that it was barred by the provisions of section 13 Exp. II of the Code of Civil Procedure.

In support of the appeal it has been argued *first*, that the subject matter of the suit brought on the 20th September 1899 by the defendants to set aside the Small Cause Court decree did not cover the property in claim in the present suit and therefore section 13, Expl. II did not impose on the present plaintiffs appellants any duty in that suit to set up as part of their defence the title which they claimed under the sale in execution of the mortgage decree, *secondly*, that even though it may be a matter which they might have pleaded in their defence in that suit, it was not a matter which it can be held that they ought to have pleaded in their defence; and *thirdly*, that even assuming that it is now open to the present defendants to raise the objection which they have raised in their defence, still as they were parties to the previous mortgage suit which was decided against them and as they failed in that suit which they instituted to have that mortgage-decree and the sale thereunder set aside, they are estopped from now setting up the plea which they have raised.

On behalf of the defendants it had been argued that the conduct of the plaintiffs in the previous litigation was such as to render it compulsory on them to set up in their defence in the suit brought to set aside the Small Cause Court decree the title on which they are now relying in support of the present suit. In that litigation the present plaintiffs all along repudiated the idea that they had any right under the mortgage deed and asserted that Bihansa Koer was in that suit acting entirely on her own account and that they had no concern with her. In the present case it has been found that the position taken up by the plaintiffs in that litigation was a false position and that in fact

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they were the persons principally interested in the mortgage and Bihansa Koer was merely acting as their representative in the litigation. It has further been pointed out that the defendant Sheo Gobind did not attain majority till 1897 and that the other defendants are younger than him and therefore, that in the previous litigation all those defendants were minors. If the findings in the present suit be accepted the plaintiffs had purchased the whole of the mouzah in execution of the Small Cause Court decree on the 7th May 1890, whereas the purchase in execution of the mortgage-decree was not made till January 1897. If the plaintiff relied on their title under the two purchases, then when the suit was brought on the 30th September 1899, to set aside the sale of the whole mouzah and to obtain possession of the whole mouzah from the present plaintiffs, they were bound to set up every title which they had in the mouzah which they could put forward to defeat the claim then made by the present defendants. They were not entitled to keep back the secret title under which they now claim under the mortgage-decree and to bring it forward in the present suit. In support of this contention we have been referred to a long series of rulings commencing with the case of *Wafeah v. Saheeba* (1) and ending with the cases of *Kameswar v. Raj Kumari Ruttun* (2) and *Srigopal v. Pirthi Singh* (3). None of these cases, however, are exactly analogous to the present, the decision of which must depend on its own circumstances.

For the appellants, reliance was mainly placed on the case of *Kailash Chandra Mandal v. Ram Narain Giri* (4) and *Rama Swami Ayyar v. Vythinatha Ayyar* (5) also on the passage in the decision of the Privy Council in the case of *Kameswar Pershad v. Raj Kumari Ruttun Koer* (2) occurring at page 238, which explains the meaning of the word 'ought' as used in the explanation 2 of section 13 of the Code of Civil Procedure. It has been argued on their behalf that the causes of action based on the title acquired by the purchase in execution of the mortgage-decree and on the title acquired by the sale in execution of the Small Cause Court decree were essentially different and that the mere fact that the two titles claimed relate one to a portion of the mouzah and the other to the whole mouzah would not render it obligatory on the present plaintiffs to have pleaded

(1) (1887) 8 W. R. 307.

(2) (1892) 1. L. R. 20 Cal. 79.; L. R. 19 I. A. 234,

(3) (1902) 6 C. W. N. 889.

(4) (1906) 4 C. L. J. 211.

(5) (1908) 1. L. R. 26 Mad. 700.

as a defence to the suit to set aside the Small Cause Court decree and sale what would have been a defence to the other suit which was brought to set aside the mortgage-decree. It is contended that in interpreting the provisions of section 13 explanation 2 of the Code of Civil Procedure, the Madras High Court has in the case to which we have been referred rightly laid down that "the real test is whether the cause of action or transaction on which two suits are based is the same, and not whether the transaction is sought to be established in different modes or by different means." Reliance was also placed on the dictum of their Lordships of the Privy Council in the case of *Kameswar Pershad v. Raj Kumari Ruttun Koer* (1), which lays down "that where matters are so dissimilar that their union might lead to confusion the construction of the word 'ought' would be important." It is pointed out that when the present defendants instituted a suit on the 30th September 1899, to set aside the Small Cause Court decree they were fully aware that, that decree covered so much of mouzah Sujiball as was excluded from the mortgage-decree which had been obtained by Bihansa Koer for $49\frac{1}{2}$ bighas ; and this is clear from the fact that on the 13th January 1900, they instituted the second suit to have the mortgage-decree and the sale in execution of the same set aside. It has also been pointed out that in the written statement filed in the suit brought by the present defendants to set aside the Small Cause Court decree the present plaintiffs who were the defendants in that suit in their written statement filed on the 18th January 1900, expressly stated the fact that $49\frac{1}{2}$ bighas had been sold in satisfaction of the mortgage-decree. It is idle, therefore, for the defendants in the present suit now to allege that at the time when they instituted the suit to set aside the Small Cause Court decree they were not aware of the existence of the mortgage-decree ; and it is further clear from the fact that they instituted two suits that the property in respect of which the suit to set aside the Small Cause Court decree was brought did not cover the $49\frac{1}{2}$ bighas included in the mortgage-decree. It is, therefore, not open to them, especially after they have failed in their suit to get the mortgage-decree set aside, now to object to the plaintiff's claim on the ground that they are setting up a secret title which they ought to have put forward in defence of the suit brought to set aside the Small Cause Court decree.

In my opinion, the arguments which have been advanced

(1) (1892) L. R. 19 I. A. 234 ; I. L. R. 20 Calc. 79.

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in support of the appeal ought to prevail. I think it is clear from the facts on the record that the present defendants were fully aware when they brought the suit to set aside the Small Cause Court decree that there was outstanding the decree obtained on the mortgage against the 49½ bighas included in the mouzah and there seems no doubt that the scope of the suit brought to set aside the Small Cause Court decree did not extend over the 49½ bighas. The causes of action in the two suits brought one on the 30th September 1899, to set aside the Small Cause Court decree and the other brought on the 13th January 1900, to set aside the mortgage-decree were in my opinion distinct and were such as could not have been joined in one suit and that being the case, as the present defendants who were the plaintiffs in that suit would have been precluded from joining the two causes of action together in one suit by way of attack. I am of opinion that it is impossible to hold that the present plaintiffs as defendants in that suit were bound under the law to put forward in defence to the suit brought to set aside the Small Cause Court decree, the title which they had under the mortgage-decree. To hold otherwise would be to decide that it was open to the present plaintiff, as defendants in that suit to bring on the record Bihansa Koer who was a third party and not included in the Small Cause Court suit and to obtain a decision with regard to a cause of action which it was not competent for the plaintiffs in that suit to raise in support of their claim. I think that such a view is impossible and that it would certainly tend to lead to such confusion as is referred to by their Lordships of the Privy Council in the case of *Kameswar Pershad v. Rajkumari Ruttun Koer* (1).

In the case of *Ramaswami Ayyar v. Vythinatha Ayyar* (2) the law as laid down in section 43 and section 13 of the Code of Civil Procedure is very fully discussed. After pointing out that their Lordships of the Privy Council in the case of *Rajah of Pittapur v. Venkata Mahipati Surya* (3), when referring to section 7 of Act VIII of 1859 which corresponds with section 43 of the present Code of Civil Procedure observed that "that section does not say that every suit shall include every cause of action or every claim which a party has, but every suit shall include the whole of the claim arising out of the cause of action meaning the cause of action on which the suit is brought," the learned

(1) (1892) L. R. 19 I. A. 234; I. L. R. 20 Calc. 79.

(2) (1903) I. L. R. 26 Mad. 760.

(3) (1883) L. R. 12 I. A. 116; I. L. R. 8 Mad. 520.

Judges of the Madras Court express their agreement with the view taken by the Judges of the same Court in the case of *Allunni v. Kunjusha* (1), in dealing with explanation 2 of section 13 of the present Code namely, that "it refers to the title litigated in the former suit as distinguished from the relief claimed. When several independent grounds of action are available a party is not bound to unite them all in one suit though he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action." In this view of the law, I agree and I hold that it equally applies to the converse case of a defendant when pleading in this defence.

Under these circumstances, I am of opinion that the title which the plaintiffs set up in the present suit was not one which they ought to have made a ground of defence in the former suit and, therefore, they are not precluded under the provisions of section 13 explanation (2) of the Code of Civil Procedure from obtaining relief in the present suit. The subject matters of the suit which was brought to set aside the mortgage-decree and the suit which was brought to set aside the Small Cause Court decree were dissimilar and distinct, and under these circumstances I think that the present plaintiffs would not have been entitled under the law to set up as a ground of defence in the suit brought to set aside the Small Cause Court decree the title which they now seek to establish in the present suit.

I hold, therefore, that the view taken by the District Judge is incorrect and that his judgment and decree cannot be maintained. The conclusion at which the Court of first instance has arrived is in my opinion in accordance with law and I, therefore, set aside the judgment and decree of the lower appellate Court and restore the judgment and decree of the Court of first instance with costs.

Woodroffe J.—I am not satisfied that the defendants have made out the plea which was urged. It is doubtful whether the appellants might have raised the question now debated in the previous litigation. However this may be, I do not think that they were under the circumstances of the case obliged to raise it. As to this, I do not think it necessary to say more as each case must in this respect be decided with reference to its own peculiar circumstances. I agree, therefore, that the appeals should be decreed in the terms proposed by my learned brother.

N. K. B.

Appeal allowed.

(1) (1883) I. L. R. 7 Mad. 264.

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*Before Sir Francis William Maclean, K. C. I. E., Chief Justice
and Mr. Justice Doss.*

CIVIL,

1908.

April, 2, 3.

GIRINDRA CHANDRA PAL CHOWDHURY AND OTHERS
v.

SREE NATH PAL CHOWDHURY AND OTHERS.*

Rent, suit for—Separate collection—Suit to recover fractional share of rent.

One of the co-sharer landlords who used to collect his share of rent separately can sue to recover arrears of rent due to him in respect of his fractional share.

Girindra Chandra Pal Chowdhury v. Sree Nath Pal Chowdhury (1) distinguished.

Sita Nath Panda v. Polaram Tripati (2), Jawadul Hug v. Ram Das Saka (3) and Ram Mohan Pal v. Sheikh Kaohu (4) referred to,

Appeal by Defendants 1 to 5.

Suit to recover rent.

The facts of the case appear sufficiently from the judgment.

Babu Hara Prosad Chatterjee for the Appellants.

Babu Bepin Chandra Mullick (for Babu Braja Lal Chakravarti) for the Respondents.

The judgments of the Court were as follows :

Maclean C. J.—This is a suit to recover rent. The finding is that one Jhari Sheikh Halsana, father of the defendants 6 to 9 cultivated a holding in the *mahal* paying a consolidated rent of Rs. 55, annas 8 for it. The plaintiff and his co-sharers, had each collected rent separately, that is, each body of sharers collected Rs. 18, annas 8 from the tenant. Defendants 1 to 5 have now bought the tenants' rights of defendants 6 to 9 and are in possession of the holding. The plaintiff sues to recover arrears of rent due to him in respect of his fractional share for certain years at Rs. 18, annas 8 a year.

It is urged for the defendants that this suit will not lie and, reliance is placed upon a recent decision of this Court in the case of *Girindra Chandra Pal Chowdhury v. Sreenath Pal Chowdhury* (1). The difference between that case and the present is marked. In that case the co-sharers of the zemindari right, who, or at any rate, many of whom, bought up the holding held

* Appeal from Appellate Decree No. 1068 of 1906, against the decree of F. MacBlaine Esq., District Judge of Nadea, dated the 16th March 1906, reversing that of Babu Ambica Charan Mozumdar, Munsiff of Krishnagar, dated the 18th September 1905.

(1) (1906) I. L. R. 32 Calc. 567.

(2) (1894) I. L. R. 21 Calc. 869.

(3) (1896) I. L. R. 24 Calc. 148.

(4) (1905) I. L. R. 32 Calc. 336.

under the zemindar : and, the plaintiff who was one of the co-sharers was one of the co-purchasers of the holding : and it was held that he being himself one of the co-purchasers of the holding and himself a tenant, could not treat his co-sharers as tenants and sue them for rent. That was the ground of decision in that case. That is quite different from the present case. Here the plaintiff is not a co-purchaser of the holding. He says I have been receiving this sum of Rs. 18, annas 8 in respect of my share of the rent. You, the defendants have purchased the tenants' right and you have placed yourselves in the position of the tenant, and I am entitled to rent from you. I think he is right.

This view seems to be consistent with some earlier decisions : There is the case of *Sita Nath Panda v. Pelaram Tripathi* (1), in which it was held that the acquisition of an occupancy right by a proprietor does not, under sub-section (2) of section 22 of the Bengal Tenancy Act, affect the right of a co-sharer landlord to receive his share of the rent of the tenancy. Then there is the case of *Jawadul Huq v. Ram Das Saha* (2), the head note of which is that "there is no law which prevents one of several co-proprietors from holding the *status* of a tenant under the other co-proprietors of land which appertains to the common estate. The effect of the purchase, by one co-owner of land, of the occupancy right is, not that the holding ceases to exist but only the occupancy right which is an incident of the holding." That was a Full Bench case : and, that view was supported by another Full Bench decision of this Court in the case of *Ram Mohan Pal v. Sheikh Kachu* (3). There it was held that by the transfer of the occupancy right to a person jointly interested in the land as proprietor or permanent tenure-holder, the holding does not cease to exist, but only the occupancy right is terminated. If then the holding does not cease to exist and the holding has now passed to the defendants, they ought to be and are liable for rent and, if there is a separate collection for this holding, and there is a finding to that effect, the plaintiff is entitled to recover his fractional share.

The appeal, therefore, fails and must be dismissed with costs.

Doss J.—I agree

A. T. M.

Appeal dismissed.

(1) (1894) I. L. R. 21 Calc. 869.

(2) (1896) I. L. R. 24 Calc. 143.

(3) (1905) I. L. R. 32 Calc. 336.

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Girindra Chandra
Pal Chowdhury

v.
Sree Nath Pal
Chowdhury.

Maclean, C. J.

*Before Sir Francis W. Maclean, K. C. J. E., Chief Justice and
Mr. Justice Doss.*

RAJA PRAMADA NATH ROY AND OTHERS

v.

SHEBAIT PURNA CHANDRA ROY.*

CIVIL.

1908.

February, 24.

March, 20.

*Shebait, decree against—Possession, suit for—Mesne profits—Idol's property,
liability of—Shebait, position of.*

Where in a suit for possession in which the defendant sets up the title of an idol, a decree was passed against the defendant as shebait, which made him liable for mesne profits:

Held, that the decree was not against the shebait in his personal capacity and the property of the idol was liable to make good the claim for mesne profits.

Per Doss J.—The possession of a *shebait* is that of a manager. He is not only empowered but bound to do whatever is necessary for the benefit or preservation of its properties.

The liability of the estate of an idol for wrongs committed by its shebait in the reasonable management of its properties, is analogous to the liability of a corporation for wrongs committed by its agents in the course of their employment, and for the apparent furtherance of its purpose.

Appeal by the Decree-holders.

Application for execution of decree for mesne profits.

The facts of the case and the arguments appear sufficiently from the judgments.

Dr. Rash Behary Ghose and Babus Tara Kishore Chowdhury and Braja Lal Chakravarti for the Appellants.

Babus Baidya Nuth Dutt, Dwarka Nath Chakravarti and Nogendra Nath Ghose for the Respondents.

C. A. V.

The judgments of the Court were as follows:

Maclean C. J.—I have read the judgment about to be delivered by my learned colleague, and as he has gone very fully into the matter and as our conclusion is the same, I propose to express my views rather more shortly.

The question raised on the appeal is whether the *debutter* property of the idol Nistarini can be attached and sold in execution of the decree passed in the present suit. The decree was passed for mesne profits for upwards of Rupees thirty-five thousand. The decree-holder contends that the judgment-debtor was sued as *shebait* of the idol, that he defended as *shebait* of the idol, and that the decree was passed against him as such *shebait*, and that the *debutter* property of the idol is consequently liable. In the

* Appeal from Original Order No. 229 of 1906, against the order of Babu Dina Nath Sircar, Subordinate Judge, Third Court of Hooghly, dated the 2nd March 1906.

decree the judgment-debtor is described as *shebait* Purna Chandra Roy, and the decree was that the mesne profits should be realised from the judgment-debtor. The decree is dated the 10th of April, 1905.

In his written statement in the suit, dated the 9th of July, 1894, the defendant is described as *shebait*: and, his case as shown in paragraph 4 is that the lands which the plaintiffs were claiming were not his lands, but the *debutter* property of certain idols; and he alleged that "he and his predecessors were in possession as *shebait*s of the valid rent-free *debutter* properties claimed." It will thus be seen that the defendant was not setting up any right of his own, but was defending on behalf of the idols and alleging that the property was the *debutter* property of those idols. Idols can only be sued through the *shebait*. If the judgment-debtor paid the amount, he would, seeing that he had defended the suit on behalf of and for the benefit of the idol, be entitled to be indemnified out of the idol's estate for the amount he so paid, his case being that it was the idol who was entitled to the property and to the mesne profits. If that be so, and it looks as if such were the case then the decree-holder claims to stand in the shoes of the *shebait* in respect of that right to indemnity as against the property of the idol. There can be no other representation of the idol in the present suit than through the present defendant the *shebait*: and in that view the idol must be taken to be before the Court. It is clear from the pleadings that the question was whether the lands in dispute belonged to the plaintiffs or were the *debutter* property of the idol. In these circumstances, I think that the order now appealed against must be taken to be an order against the defendant as *shebait*, and not in his personal capacity, and that the property of the idol is liable to make good the claim for mesne profits, and consequently the appeal must be allowed with costs, ten gold mohurs.

Doss J.—The facts which raise the points in controversy are few and may be briefly stated. On the 18th March, 1882, the predecessors in title of the decree-holders purchased at a sale held in execution of a mortgage decree against judgment-debtor Purna Chandra Roy, an eight annas share of Lot Kishmut Mahomed Aminpur save and except a considerable quantity of *debutter* lands, the area whereof was specified in the mortgage and sale certificate but their exact situation was undefined. The decree-holders obtained possession of the major portion of the property but were prevented by the judgment-debtor from

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obtaining possession of some lands which according to them were included in their purchase. They, therefore, brought an action against the judgment-debtor, Purna Chandra Roy, to recover possession of those lands. Purna Chandra Roy put in his defence as *shebait* and asserted that the lands claimed were outside the decree-holder's purchase, that they were the *debutter* property of idols for whose worship they had been dedicated by their ancestors and that the expenses of the idols were defrayed out of their income. The Court below was of opinion that the allegation of the judgment-debtor, Purna Chandra Roy, that sixty *bighas* were the *debutter* property of the idol Sarba Mangala and that a ten annas share of Bally Hat was the *debutter* property of the idol Ram Sita of Vadrakali was correct, and accordingly dismissed the claim of the decree-holders in respect of those lands. As regards the remaining lands which the judgment-debtor alleged was the *debutter* property of the idol Nistarini, the Court below decreed the plaintiff's suit with the exception of 25 *bighas* of *hat* Seorafully, called the lower *hat* which were found to be the *debutter* of that idol and in respect thereof the decree-holders' claim was dismissed. On appeal, this Court affirmed the decree of the Court below with a slight modification to which it is unnecessary to advert. Then on the 1st July, 1903, the decree-holders brought an action against the judgment debtor for mesne profits for the lands decreed to them in the previous action and, on the 10th April, 1905, obtained a decree for Rs. 32,467 for mesne profits, inclusive of interest and costs. In the decree, Purna Chandra Roy is described as "*shebait* Purna Chandra Roy defendant judgment-debtor," and it directs that the decree-holders do realise the said sum from the judgment-debtor. In execution of this decree the decree-holders sought to attach and sell the twenty-five *bighas* which, in the previous action, had been found to be the *debutter* of the idol Nistarini. The judgment-debtor objected that the decree for mesne profits had been passed against him in his personal capacity and that consequently the *debutter* lands could not be attached in execution thereof. The Court below has given effect to this contention. The decree-holders have appealed, and it has been contended on their behalf, *first*, that the decree for mesne profits is against Purna Chandra Roy in his capacity of *shebait* and that therefore it can be executed against *debutter* lands, *secondly*, that having regard to the circumstances under which that decree was passed the *debutter* lands of the idol Nistarini can be attached and sold in execution, and *thirdly*, that the evidence which the

decree-holders offered to adduce in the Court below in order to prove that the mesne profits of the land decreed to them had been appropriated for the purposes of the idol Nistarini ought to have been taken.

As regards the first contention it is clear from the description of the judgment-debtor in the decree that it is made against him in his character of *shebait*. In the previous action for possession the judgment-debtor, who was then the defendant, could not be styled as *shebait* in the plaint as the decree-holders could only claim to recover possession on the footing that the lands were *mal*, i.e., non-*debutter* lands. It is only when the judgment-debtor, in his written statement, raised the defence that the lands were *debutter*, and set up the title of certain idols in respect thereof, and signed and verified his written statement as "*shebait*" that he assumed the character of *shebait*, and, indeed, having regard to the fact that *debutter* lands alone had been excepted from the decree-holders' purchase, this was the only possible defence which was open to him in the action.

In all the subsequent proceedings and, above all, in the decree for mesne profits, the judgment-debtor, Purna Chandra Roy, has been described as *shebait*. It is clear, therefore, that the decree under execution must be held to have been passed against Purna Chandra Roy in his capacity of *shebait*. It is equally clear from the judgments of this Court and of the Court below in the previous action for possession that Purna Chandra Roy had been fighting in the interest and for the benefit of the idols. If he had succeeded in that action in respect of the entire lands claimed as being the *debutter* of the idol Nistarini as he had been successful in respect of the *debutter* of the idols Sarba Mangala and Ram Sita, the lands recovered by the decree-holders would have continued to form part and parcel of Nistarini's *debutter*.

It is because he failed, that the decree-holders obtained a decree for mesne profits.

The powers and duties of a *shebait* may now be taken as almost settled. Apart from his duties in connection with the worship and service of the idol, a *shebait* has the possession and management of its properties. In other words his possession is that of a manager and he is not only empowered but bound to do whatever is necessary for the benefit or preservation of its properties. He is, among other things, empowered for the protection of the idol's estate to bring suits (see *Maharaja*

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Jagadindra Nath Roy v. Rani Hemanta Kumari Debi (1), and "to defend hostile litigious attacks" (see *Prosunno Kumari Debya v. Golab Chand Baboo* (2); Purna Chandra Roy was, therefore, not only justified in defending the suit for possession (wherein as I have already said, he was to a considerable extent successful), but would have been guilty of dereliction of duty if he had abstained from opposing the action. *Prima facie*, therefore, the decree for mesne profits which was the inevitable result of such opposition, ought to be realisable out of the estate of the idol. If the rents and profits, collected during the period for which the decree-holders have been kept out of possession, have been applied wholly for the purposes of the idol, then there can scarcely be any doubt that the estate of the idol must compensate the loss sustained by the decree-holders. But supposing that they have been appropriated by the *shebait* Purna Chandra Roy to his own private purposes and not to those of the idol, it seems to me equally plain that the estate of the idol ought to bear the loss, though the *shebait* would, in such a case, be accountable to the former for such misappropriation.

The liability of a trespasser for mesne profits arises not because the latter has collected the rents and profits (for either through his negligence or for some other reasons he might not have collected any rents and profits), but because in consequence of the wrongful dispossession by him, the owner has been deprived of the rents and profits, which he otherwise would have collected. The foundation of the trespasser's liability is not the gain which he makes, but is the loss which the owner sustains.

The liability of the estate of an idol for wrongs committed by its *shebait* in the reasonable management of its properties, is analogous to the liability of a corporation for wrongs committed by its agents in the course of their employment, and for the apparent furtherance of its purposes. (See *The Mersey Docks Trustees v. Gibbs* (3), *The Taff. vale Railway v. Amalgamated Society of Railway Servants* (4)), and in both cases it is founded on the policy of the law and without regard to personal default, for both the idol and the corporation are incapable of personal wrong doing. Neither can be invested with rights or duties except through natural persons, who are their agents.

The liability of a trust estate for damages for wrongs committed by the trustee in the reasonable management of the trust estate is merely another, though perhaps not so obvious, an

(1) (1904) L. R. 31 I. A. 203.

(2) (1875) L. R. 2 I. A. 145.

(3) (1866) L. R. 1 H. L. 93.

(4) (1901) A. C. 426.

illustration, of the same general principle [*In re Raybould*, (1)] The fact that in such a case it is the trustee who is personally liable at law, and that the trust estate may only be reached in equity through the medium of the doctrine of subrogation, is the necessary consequence of the legal estate being vested in the trustee, and it, in no way, affects the general principle upon which the liability depends.

It has been observed by the Court below that if execution against the idol's properties be allowed, it may, in cases where the *shebait* is not possessed of independent means, lead to the extinction of its estate. But it appears to me that the obvious answer to this argument is that if the idol may lose the whole or a portion of its properties, in case its *shebait*, through laches, suffers a trespass for more than 12 years as undoubtedly it may, see *Gnanasambanda Pandara Sannadhi v. Vela Pandaram* (2), *Shama Charan Nundy v. Abhiram Goswami* (3), *Ram Kanai Ghosh v. Raja Sri Sri Hari Narayan Singh Deo Bahadur* (4), *Nilmony v. Jagabandhu* (5), no grave anomaly is involved in holding that the idol ought to lose the whole or a portion of its properties, if the *shebait*, in the prudent management of its properties and in the furtherance of the interest of the idol, unintentionally commits a trespass and thereby renders the idol's estate liable for damages.

As regards the second contention, I have already pointed out that Purna Chandra Roy in the previous action for possession set up in respect of some lands the right of the idol Sarba Mongala, in respect of others the right of the idol Ram Sita of Vadrakali, and in respect of the remaining lands, the right of the idol Nistarini. His first two claims were successful, and it was only in respect of the third which was based on the right of the idol Nistarini, that he failed with the exception however, of 25 *bighas* which were found to be *debutter*. It is quite clear, therefore, that the decree for mesne profits was and could only be obtained for lands in respect of which he had unsuccessfully set up the right of the idol Nistarini.

In the view which I have taken of the first and second contentions, it becomes unnecessary for me to say any thing with regard to the third.

For the foregoing reasons, I am of opinion that the appeal ought to be decreed with costs.

A. T. M.

Appeal decreed.

(1) (1900) 1 Ch. 199.

(3) (1906) 1 L. R. 33 Calc. 511.

(2) (1899) L. R. 27 I. A. 69.

(4) (1905) 2 C. L. J. 546.

(5) (1896) 1 L. R. 23 Calc. 536.

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PRIVY COUNCIL.

PRESENT :—*Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble
and Sir Arthur Wilson,*

HANSRAJ AND OTHERS

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SUNDAR LAL AND ANOTHER

AND

HANSRAJ AND OTHERS

v.

DWARKA DAS AND ANOTHER

AND

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

[ON APPEALS FROM THE CHIEF COURT OF THE PUNJAB, AND FROM
THE COURT OF THE AGENT TO GOVERNOR-GENERAL IN
CENTRAL INDIA.]

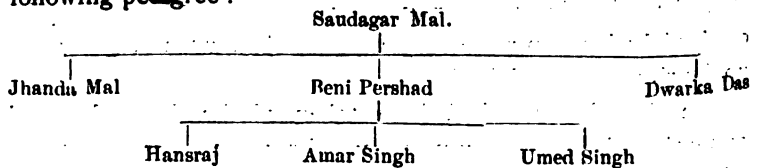
*Arbitration—Award, objections to it—Alleged misconduct of the Arbitrator—
Dismissal of objections—Decree in accordance with the award—Appeal
from such a decree, incompetency of—Civil Procedure Code (XIV of 1882),
Sec. 522.*

No appeal lies against a decree confirming an arbitration award, except in
so far as the decree is in excess of or not in accordance with the award.

No. 39 of 1905.—Appeal from a decree of the Chief Court of
the Punjab (June 27, 1902) affirming a decree of the District
Judge of Delhi (April 9, 1901).

The principal question involved in the appeal was the compe-
tency of an appeal from a decree made in accordance with an
award.

The parties to the litigation were all members of the same
family, and their relationship to each other is shown in the
following pedigree :—



Jhanda Mal died *pendente lite* and was represented by the
first respondent, Sundar Lal.

Umed Singh also died and the third appellant Mussammat
Khemi represented him.

The family owned immovable property at Pundri and
Kaithal in the District of Karnal; at the Sehore Cantonment,

at Berasia in the Bhopal State and at Biawara in the Rajgarh State. They also had a banking and mercantile business with branches at Pundri, Sehore, Berasia, Biawara and Bhopal.

On July 13, 1886 the respondent Dwarka Das instituted a suit for partition of the joint estate, other than that situate in the District of Karnal, in the Court of the Political Agent, Bhopal. The defendants to that suit were Beni Pershad and Jhanda Mal. On September 4, 1901, the Political Agent made his decree in that suit, the subject-matter of Privy Council Appeal No. 5 of 1905.

On August 14, 1888, Jhanda Mal instituted the present suit in the Court of the District Judge of Karnal against Hansraj, Amar Singh, Umed Singh and Dwarka Das for partition of the whole of the joint estate, movable and immovable, situate in the Karnal District and other places already mentioned. By an order of the Chief Court of the Punjab, the suit was transferred to the Court of the District Judge of Delhi.

The appellants, three of the four defendants in the suit, pleaded *inter alia* that they were ready and willing to partition all that constituted the joint estate, but that the suit was barred under section 12 of the Civil Procedure Code (Act XIV of 1882) in consequence of the pending suit between the parties for the same relief in the Court of the Political Agent, Bhopal, and also in consequence of a reference to arbitration in that suit.

The respondent Dwarka Das, the fourth defendant, by his written statement raised no objection to the plaintiff's claim.

On October 11, 1889, the District Judge (Mr. Clifford) decided that the Political Agent at Bhopal had no civil jurisdiction, and on June 25, 1890, he struck out the appellant's defence for failing to produce all the books of accounts filed in the Court at Sehore. On August 7, 1890, he made a decree *ex parte* in favour of the plaintiff, but on April 23, 1892, the Chief Court of the Punjab set aside that decree and remanded the case for retrial.

The plaintiff then amended his plaint, and the appellants in defence reiterated their previous defence and also challenged the jurisdiction of the Delhi Court to partition properties situate out of British India.

It is not necessary to set out the large number of issues fixed in this case. On February 13, 1893, the District Judge (Mr. Rennie) decided that he had no jurisdiction in regard to property, movable or immovable, situate outside British India. On an application for review, which the appellants contended

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was wholly incompetent, another District Judge (Mr. Harris) reversed the order of his predecessor in regard to the movable property. On November 26, 1894 the District Judge again made an *ex parte* decree in favour of the plaintiff, but on May 11, 1896, the Chief Court reversed that decree and remanded the case for retrial by the Divisional Judge of Delhi (Mr. Clifford).

On August 28, 1897, the parties signed an agreement to refer the case for settlement to Mr. Clifford as arbitrator. The agreement provided *inter alia* "that all account books will not be brought here (Delhi) from Sehore. But if the arbitrator thinks proper to examine any of the *bahis*, it will be produced before him". The Chief Court then retransferred the case to the Court of the District Judge of Delhi, and on November 7, 1898, the District Judge made an order of reference, the material part of which was as follows :—

"The arbitrator shall have power to award Rs. 95,000 to Seth Hans Raj, Amar Singh and Mussammat Khemi, defendants and Rs. 25,000 to Seth Dwarka Das, defendant, besides their share, as it was previously agreed to with the mutual consent of the parties out of the joint stock, and to determine what joint property, movable and immovable of any description, apart from the immovable property out of British India, is capable of partition, and he should divide it among the parties according to their shares and award to each party whatever may be his due share. It has also been agreed that the account books would not be brought from Sehore to Delhi ; if the arbitrator would require the inspection of any account book in his opinion, that would be produced before him. Whatever award would be passed in the case it would be accepted and consented to by the parties."

On May 25, 1900 the arbitrator made his award.

On June 12, 1900 the appellants filed a petition raising among others the following objections to the award :—

"(5) The arbitrator was guilty of misconduct in going behind accounts which had formally been settled and agreed to before April 2, 1886 and thereafter acted upon.

"(6) The arbitrator was guilty of misconduct in violating the spirit of the agreement in calling for books unnecessarily, thus—

"(a) Prolonging the enquiry.

"(b) Putting objectors to great expense and trouble.

"(c) Harassing him by frequent journeys to a plague-stricken quarter, when it was not originally contemplated, he

should go and eventually bring them out (see objectors' petition to Court dated 1st December 1899) notwithstanding all statements of accounts called for were made and submitted.

"(7) The arbitrator was guilty of further misconduct in, after objectors had produced over fifty books of accounts, calling for, at the instance of the other party, the production of over two hundred more.

"(8) The arbitrator was guilty of misconduct in drawing conclusions adverse to objectors, because they did not comply with this exorbitant demand.

"(13) The arbitrator has been guilty of misconduct in making objectors practically purchase the said other firms at exorbitant fancy cash prices, and on the other hand awarding Pundri to the other parties at a ridiculously cheap price."

On April 9, 1901 the District Judge dismissed the appellants' objections and made a decree in accordance with the award.

Against that decree, the appellants filed an appeal in the Chief Court of the Punjab, and in the alternative prayed for revision under section 622 of the Civil Procedure Code. On June 27, 1902 the Chief Court dismissed the appeal on the ground that the appeal was incompetent, inasmuch as it did not appear that the decree was in excess of, or not in accordance with, the award.

The appellants, thereupon, brought the present appeal to His Majesty in Council.

No. 5 of 1905.—Appeal from a decree made by the Court of the Agent to the Governor-General in Central India (November 17, 1902), affirming a decree made by the Court of the Political Agent at Sehore (September 4, 1901).

On July 13, 1886, Dwarka Das instituted the present suit in the Court of the Political Agent at Sehore for partition of the properties within its jurisdiction against Beni Pershad and Jhanda Mal.

The Political Agent appointed Commissioners to effect the partition. They proceeded to divide some of the properties and the proceedings not being satisfactory to the parties, on February 18, 1887, an agreement was come to by the parties to refer their disputes to an arbitrator. He did not act and a fresh agreement was made on December 24, 1887, appointing four arbitrators.

Before any award was made, Jhandha Mal on August 14, 1888 instituted the suit, the subject-matter of appeal No. 39 of 1905.

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On May 14, 1901, Dwarka Das applied to the Political Agent for a decree to be made in accordance with Mr. Clifford's award already referred to in Appeal No. 39 of 1905. On September 4, 1901, the Political Agent accordingly made a decree.

On November 18, 1901, the appellants appealed against that decree to the Court of the Agent to the Governor-General in Central India, and on November 17, 1902, the said Court dismissed the appeal and subsequently refused leave to appeal to His Majesty in Council. The appellants, thereupon, applied to His Majesty in Council for special leave to appeal, which was granted with liberty to the Secretary of State for India in Council to intervene in his official capacity on the question as to the jurisdiction of the Court of the Political Agent.

Mr. De Gruyther and Mr. Mitra for the Appellants :—
 On February 13, 1893, Mr. Rennie, the then District Judge, decided that he had no jurisdiction in regard to property, movable or immovable, situate outside British India. Mr. Harris, who succeeded Mr. Rennie, reviewed his predecessor's decision and reversed it in regard to the movable property so situated. It was wholly incompetent on the part of Mr. Harris to entertain such an application for review of the judgment delivered by another Judge. Mr. Harris had no jurisdiction, under the circumstances of this case, to review his predecessor's judgment : Civil Procedure Code (Act XIV of 1882), section 624.

The Chief Court, in delivering its judgment on the appellants' appeal against an order striking out their defence for non-production of account-books, said "we are of opinion that it (production of the account-books in the Court at Delhi) was neither necessary nor desirable." The agreement to refer the case to arbitration provided that "all the account books will not be brought here (Delhi) from Sehore. But if the arbitrator thinks proper to examine any of the *bahis*, it will be produced before him." The first order of reference to the arbitrator gave him "all such powers or authorities as are vested in arbitrators under the Code of Civil Procedure, including therein power to call for all books of account that he may consider necessary, subject to any decision that may have been passed by the Chief Court, or any agreement between the parties." The arbitrator could not make an order, as he in fact did, for the production of books without regard to the decision of the Chief Court, the agreement of the parties and the order of reference to arbitration. The appellants produced the account-books of Bhopal

and Berasia shops and explained the non-production of other books as ordered. But the arbitrator proceeded *ex parte* to make his award, in making which he drew inferences against the appellants from the absence of books. The arbitrator here has been guilty of misconduct. The District Judge dismissed the appellants' petition of objections to the award and made a decree in accordance with the award. The Chief Court on appeal held that section 522 of the Civil Procedure Code prohibited an appeal from the District Judge's order, which rendered the award final. The Chief Court relied upon *Ghulam Filani v. Muhammad Hassan* (1), but in that case, the award was not objected to on the ground of misconduct of the arbitrator. In the present case, we do not want to challenge the finality of the award, but we allege misconduct on the part of the arbitrator. The District Judge found that there was no misconduct, and we say that there is a right of appeal from that decision of the District Judge. Section 521 of the Civil Procedure Code lays down the grounds on which an award shall be set aside, and misconduct or corruption of the arbitrator is one of them. In *Mothooranath Tewaree v. Brindaban Tewaree* (2) the first Court set aside an award on the ground of misconduct and made a decree after hearing the case on the merits. On appeal, the District Judge reversed the order of the lower Court setting aside the award and made a decree in accordance with the award. The High Court upheld the decision of the District Judge. It is submitted that there is an appeal when the Court holds that there was no misconduct as well as when the Court holds that there was misconduct. The High Courts in India have held that an appeal will lie against a decree given in accordance with an award, under section 522 of the Civil Procedure Code, when the award upon which the decree is based is not a valid and legal award: [*Kali Prosanno Ghose v. Rajani Kant Chatterjee* (3), *Ramesh Chandra Dhar v. Karunamoyi Dutt* (4), *Venkayya v. Venkatappayya* (5), *Najm-ud-din Ahmad v. Albert* (6).]

When the arbitrator is guilty of misconduct the award is invalid and illegal.

[LORD ATKINSON : Is there any other method by which you can set aside an award on the ground of corruption ?]

MR. DE GRUYTHER : None other except under section 521. *No. 5 of 1905*.—The decree under appeal is based on the award

(1) (1901) L. R. 29 I. A. 51.

(2) (1870) 2 W. R. 327.

(3) (1897) 1. L. R. 25 Cal. 114.

(4) (1906) I. L. R. 33 Cal. 498.

(5) (1891) I. L. R. 15 Mad. 348.

(6) (1907) I. L. R. 29 All. 584.

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in the last case. When a decree is based upon a foreign judgment, the foreign judgment must be final. If appeal No. 39 fails, this appeal fails too. But if that appeal is successful, the Secretary of State for India may find a way to get the decree under appeal in this case altered in accordance with the decision of this Board.

Mr. Cohen, K. C. and Mr. Ross for the Secretary of State for India : No appeal to this Board could lie from an order of the Agent to the Governor-General. This Board had no jurisdiction. If the appeal in No. 39 of 1905 failed, there was an end to this appeal. But if that appeal were allowed, it was not right that the order of the Political Agent should be allowed to stand as it was entirely based upon the judgment in appeal No. 39 of 1905. In that case, the Secretary of State for India reserving his right to raise the question of jurisdiction on any future occasion would see that justice was done. There could be a petition to His Majesty, who could refer the matter to this Board under section 4 of 3 and 4 Will. 4, c. 41.

Mr. Cowell for the Respondents : It was never suggested that the decree of the District Court was not in accordance with the award, and when there is a decree in accordance with the award, there is no appeal from such a decree : section 522 of the Civil Procedure Code.

[SIR ARTHUR WILSON : Is there anything to take away the right of appeal on the award ? section 521 refers to setting aside an award on certain grounds only.]

[LORD ATKINSON : Suppose the District Judge refuses an application to set aside an award, and makes a decree in accordance with the award, which stands. Can there be no appeal on refusal to set aside an award ?]

Mr. Cowell : Section 522 provides an appeal from such a decree in so far as the decree is in excess of, or not in accordance with, the award. If the decree is in accordance with the award, there is no appeal : *Ghulam Filani v. Muhammad Hassan*. (1)

Mr. De Gruyther replied.

The judgment of their Lordships was delivered by

Lord Macnaghten.—The parties to these two appeals or their predecessors in title have been in litigation now for more than 20 years. The subject of litigation is the property of a joint Hindu family engaged in business, with branches in different parts of the country. Part of the family property is situated in

(1) (1901) L. R. 29 I. A. 51.

British India ; part in native States. The litigation was begun, in 1886, in the Court of the Political Agent at Sehore, in Bhopal by a suit for partition of so much of the family property as was within his jurisdiction. The next proceeding was a suit for partition, commenced in 1888, in the Court of the District Judge of Karnal, in the Punjab.

In August 1897, after prolonged litigation, the parties to the Punjab suit nominated Mr. S. Clifford, Divisional Judge of Delhi, sole arbitrator to decide the matters in dispute in the suit. The arbitrator was to determine what joint property, movable and immovable, except the immovable property outside British India, was to be partitioned between the parties. The appointment of Mr. Clifford was duly confirmed by the Court.

The arbitrator finally submitted his award on June 29th, 1900.

The appellants filed a great number of objections to the award. These objections were considered and disposed of by the District Judge of Delhi, who passed a decree in accordance with the award.

The objections filed by the appellants were all more or less frivolous. In some the arbitrator was charged with misconduct, but, on the face of the objections, it is perfectly clear that there was no misconduct within the meaning of that expression in the chapter on arbitration in the Civil Procedure Code, nor anything that could justify the Court in setting aside or remitting the award.

From the decree of the District Judge, the appellants appealed to the Chief Court of the Punjab.

The Chief Court dismissed the appeal on the ground that the appeal was incompetent, inasmuch as it did not appear that the decree was in excess of, or not in accordance with the award.

In the meantime the Political Agent in Bhopal had made a decree in accordance with Mr. Clifford's award. There was an appeal to the Court of the Agent to the Governor-General in Central India, but the appeal was dismissed. Special leave to appeal against the order of the Agent to the Governor-General was granted by this Board on the representation that there was or might be an important question as to the jurisdiction of the Court of the Political Agent. And liberty was reserved to the Secretary of State for India in Council to intervene in his official capacity. Mr. Cohen, who appeared for the Secretary of State not admitting that an appeal would lie to His Majesty in

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Council from the order of the Agent to the Governor-General in India, intimated that the Court of the Political Agent in Bhopal would be guided by the decision of the Chief Court of the Punjab if His Majesty thought fit to affirm that decision.

In their Lordships' opinion the decision of the Chief Court is perfectly right. Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed.

The appellants will pay the costs of the appeals other than the costs of the intervenant.

Messrs. Rubinstein, Myers & Co.—Solicitors for the Appellants.

Messrs. T. L. Wilson & Co.—Solicitors for the Respondents.

Solicitors for the India Office.—Solicitors for the Intervenant.

J. M. P.

Appeals dismissed.

PRESENT : *Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble, and Sir Arthur Wilson.*

T. P. PETHERPERMAL CHETTY

v.

R. MUNIANDY SERVAI AND OTHERS.

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 February, 5.
 March, 18.

[ON APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Benami conveyance—Colourable conveyance in fraud of creditor—Fraud, absolutely defeated—Suit by real owner against benamidar—Right of real owner to recover possession of his property—Indian Limitation Act (XV of 1877), Schedule II, Articles 91 and 144.

When property has been transferred *benami* with a view to effect fraud, but the fraud is not effected, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme and recovering possession of the property. If however the contemplated fraud has been effected, the fraudulent grantor has lost the right to claim the aid of the law to recover the property he has parted with.

As a *benami* conveyance is an inoperative instrument, it is not necessary to set it aside. A suit to recover the property is governed not by Art. 91 but by Art. 144 of Schedule II of the Limitation Act.

Appeal from a decree of the Chief Court of Lower Burma (February, 2, 1905), affirming a decree of the District Court of Hanthawaddy (March, 9, 1903).

One Muniandi Maistry was the owner of a grant known as the Tankkyan grant. During the years 1888 and 1889 he borrowed several sums of money from one Stumpp, with whom the title deeds of the said grant were deposited as security for the

re-payment of the debt. Muniandi Maistry died on October, 3, 1890, leaving him surviving as his next heir, his mother Sigappa, to whom Letters of Administration to his estate were granted by the Court of the Recorder of Rangoon.

On November, 28, 1890, Stumpp assigned the said debt to one Arunachellam Chetty.

Sigappa died on December, 1, 1893, and on her death, the next heirs to the estate of Muniandi Maistry were his cousins Chellam Servai and Muniandy Servai, who were brothers and members of a joint undivided family. In 1894 Letters of Administration were granted to Chellam Servai of the estate of Muniandi Maistry.

On September, 18, 1895, Arunachellam Chetty instituted a suit in the Court of the District Judge of Hanthawaddy to recover the amount due, *viz.*, Rs. 14,568-12 by sale of the said grant. In the meantime Chellam Servai had on June, 11, 1895, executed what purported to be a sale of the said grant to one T. P. Petherpermal Chetty for a consideration of Rs. 30,000 for the grant and four years' arrears of rent due from the tenants. The respondent R. Muniandy Servai contended in the present suit that the said deed of sale was a fictitious transaction, and executed with intent to prevent the sale of the property by Arunachellam Chetty. In defence to the said suit it was pleaded that the sale to T. P. Petherpermal Chetty, who had no notice of the equitable mortgage, gave him a title free from the incumbrance. On January 3, 1896, the District Judge gave Arunachellam Chetty a decree for sale, finding that T. P. Petherpermal Chetty at the time of the conveyance to him had full notice of the equitable mortgage. That decree was confirmed on appeal. T. P. Petherpermal Chetty, thereupon, mortgaged the said grant to R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, respondents 3 and 4, and obtained from them a loan and discharged the amount due to Arunachellam Chetty for debt and costs. No question as to the validity of this mortgage was raised in the present suit.

Chellam Servai died on June 15, 1896, and on his death Muniandy Servai, respondent No. 1, became entitled to the estate. At that time he was in Madras, and did not return to Burma till some six months later. T. P. Petherpermal Chetty then asserted an absolute title in himself to the said grant. On June, 4, 1897, Muniandy Servai applied for letters of administration to such portion of the estate of Muniandi Maistry, as was unadministered. In his application he challenged the title of

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T. P. Petherpermal Chetty, who opposed the application. In the result an order was made on July, 15, 1897, for a regular civil suit to establish the title of Muniandy Servai, whose application was refused. The dispute was thereafter referred to a *Punchayet*, who decided in favour of Muniandy Servai. T. P. Petherpermal Chetty agreed to restore possession and render accounts. Muniandy Servai wished to return at once to Madras, so Rs. 1,000 was paid to him on account, and the actual delivery of possession and settlement of accounts was postponed till his return. He left Rangoon on the morning of July 30, 1897, and at 7 o'clock on the morning of the same day executed a document at a house of one Maung Shwe Waing. That document purported to be a release of all claims; but it was contended by Muniandy Servai that at the time of execution T. P. Petherpermal Chetty fraudulently represented that it was a record of the arrangement come to as above set out.

Muniandy Servai returned to Burma about a year afterwards. T. P. Petherpermal Chetty refused to give up possession and set up the document of July 30, 1897 as a release. On July 24, 1901 Muniandy Servai instituted the present suit in the Court of the District Judge of Hanthawaddy against T. P. Petherpermal Chetty and respondents 2 and 3, the mortgagees as defendants. He claimed possession of the said grant and alleged that the deed of sale dated June 11, 1895 was not a real transaction and that the deed of release dated July 30, 1897 had been fraudulently obtained for him.

The defence was a denial of the plaintiff's allegations. It was also pleaded that the plaintiff had no right to sue.

On the pleadings the District Judge fixed the following principal issues:—

1. Is the plaintiff solely entitled to the plaintiff premises? If not, what is his share therein?
2. Is the conveyance dated the 11th June, 1895, mentioned in para. (7) of the plaintiff *benami*? Is plaintiff entitled to question its validity?
3. If not, is it valid as against the plaintiff, and on what conditions liable to be set aside?
4. Was there an agreement as stated in para. 15 of the plaintiff?
5. Was the release, dated the 30th July, 1897, executed by the plaintiff under the fraudulent misrepresentations (as stated in paras. 16, 17 and 18) of the 1st defendant?

6. Did the plaintiff receive the sum of Rs. 1,000 in full satisfaction of all his claim?

7. Is the release, dated 30th July 1897, of any legal effect?

The District Judge decided on the first issue that the plaintiff was entitled to sue, as head of the joint family, for the entire estate. On the second and third issues, he held that the conveyance dated June 11, 1895 was a *benami* conveyance and the plaintiff had the right to question its validity and that in place of that *benami* deed must be substituted the real agreement between Petherpermal and Chellum—Petherpermal accounting for rents received and money raised on the security of the land, and plaintiff crediting cost of collection and litigation and other expenses justly debitable to the administration of the property as well as money received for the personal use of Chellum and himself. On the remaining issues he decided that Petherpermal Chetty had recognised the plaintiff's claim before the *punchayet* and agreed to restore possession and render accounts on the plaintiff's return from Madras. He also found that the release dated July 30, 1897 was obtained by fraud, and was not binding on the plaintiff, though admissible in evidence in consequence of an order passed by his predecessor in office. He was of opinion that the suit was not barred by limitation, and in accordance with his findings made a decree in favour of the plaintiff on March 9, 1903.

Against that decree the son of T. P. Petherpermal Chetty (who had been substituted on record in place of his father deceased) appealed to the Chief Court of Lower Burma, and on February 2, 1905 the Chief Court delivered its judgment, and affirmed all the findings of fact and law of the Court below except in one particular. The Chief Court decided that the release dated July 30, 1897, was not duly registered and thus inoperative to affect the immovable property. In the result a decree was made dismissing the appeal.

The appellant, thereupon, preferred the present appeal to His Majesty in Council.

Mr. Upjohn, K. C., and Mr. Bailhache, for the Appellant:—

The first respondent contends that the conveyance of June 11, 1895 was made to defraud a creditor and that that conveyance was *benami*. If he succeeds, the effect would be too increase fraud upon creditors. But if he fails, debtors would be deterred from combining with others to defraud creditors. It is desirable to promote commercial morality and the maxim *in*

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pari delictis potior est conditio possidentis should in a case like this be rigorously applied. To adopt a course otherwise would import confusion into the law.

The first respondent cannot succeed unless he shows that the fraud was not carried out. *Taylor v. Bowers* (1), the document was actually used in the then pending litigation. When two persons are parties to a conveyance, which on the face of it is genuine, for a reasonable consideration, and the object of it is to use it in a pending litigation for the purpose of defeating the plaintiff's claim in that litigation, the user of that conveyance is the accomplishment of that fraud and any property transferred by one of them to the other cannot be recovered back.

[LORD MACNAGHTEN: Any authority for that?] *Mr. Upjohn*: No direct authority, my Lord, but *Kearlev v. Thomson* (2), shows that partial performance of an illegal contract prevents a plaintiff from recovering back the money paid under it. Reference was also made to Mayne on Hindu Law and Usage (6th ed.), p. 571, ch. 13, section 404 and *Govinda Kuar v. Lala Kishun Prosad* (3), and *Kali Charan Pal v. Rasik Lal Pal* (4).

The first respondent cannot succeed unless the conveyance of June 11, 1895 is set aside. The period of limitation allowed to set it aside is three years: Indian Limitation Act (XV of 1877), Sch. II. art. 91. That period began to run, when the right to cancel it arose on the death of Chellum in 1896, when the plaintiff knew all facts, though the Courts in India have held that he knew the facts all along even before that time in 1895.

Mr. De Gruyther for the first Respondent was not called upon.

The judgment of their Lordships was delivered by

March, 18.

Lord Atkinson.—In this case an action was originally brought by R. Muniandy Servai claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherpermal Chetty, the uncle and predecessor of the appellant (hereinafter called "Petherpermal the elder"), and two formal defendants, R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, to recover possession of a certain tract of paddy land about 2,500 acres in extent, known as Government Waste Land No. 1, situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy District,

(1) (1876) 1 Q. B. D. 291.

(2) (1890) 24 Q. B. D. 742.

(3) (1900) 1 L. R. 28 Calc. 370, at 379.

(4) (1894) 1 L. R. 23 Calc. 962.

Lower Burma. One Arunachellam Chetty claimed to be an incumbrancer on these lands as equitable mortgagee by deposit of the title-deeds for a sum of Rs. 14,568-12-0.

On the 11th June 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the above-mentioned lands to Petherpermal Chetty the elder, a money-lender residing in Rangoon, in consideration of the sum of Rs. 30,000, the receipt whereof was thereby acknowledged.

On the 18th September 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy against Chellum Servai, as administrator of the estate of Muniandy Maistry deceased, and Petherpermal the elder in which he alleged that at the time of the execution of the above-mentioned conveyance, Petherpermal the elder was aware of the existence of his (Arunachellam's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12 with interest, and other relief.

Petherpermal the elder filed his defence, and, the case having come on for hearing, the District Judge decided, amongst other things, that Petherpermal the elder was, at the date of the deed of conveyance to him, well aware of the existence of equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai to pay to the plaintiff the amount of the latter's claim. Thereupon Petherpermal the elder procured a loan from the two formal defendants to the present suit sufficient to enable him to discharge the amount due to Arunachellam Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is, therefore, clear that, whatever may have been the design to effect which the deed of the 11th June 1895 was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take,

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On the 30th July 1897 R. Muniandy Servai and Petherpermal the elder executed a deed of release by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by a misrepresentation, and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case, that the deed of the 11th June 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was "a *benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the Judge who tried the case and saw the witnesses, approved, as it was, upon appeal, should under the circumstances of the case be disturbed. The only questions therefore, for their Lordships' decision are :

1. Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed ?

2. Is his right of action barred by the 91st Article of Schedule II. to the Indian Limitation Act ?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In Mayne's Hindu Law (7th ed., p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus :—

"446Where a transaction is once made out to be a mere *benami* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested. The fact that A has assumed the name of B in order to cheat X can be no reason whatever why a Court should assist or permit B to cheat A. But if A requires the help of the Court to get the estate back into his own

possession, or to get the title into his own name, it may be very material to consider whether A has actually cheated X or not. If he has done so by means of his *alias*, then it has ceased to be a mere mask, and has become a reality. It may be very proper for a Court to say that it will not allow him to resume the individuality which he has once cast off in order to defraud others. If, however, he has not defrauded any one, there can be no reason why the Court should punish his intention by giving his estate away to B, whose roguery is even more complicated than his own. This appears to be the principle of the English decisions. For instance, persons have been allowed to recover property which they had assigned away..... where they had intended to defraud creditors, who, in fact, were never injured..... But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies, *In pari delicto potior est conditio possidentis*. The Court will help neither party. 'Let the estate lie where it falls.'

Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was so unrighteously and unwisely put.

The answer to that is that the plaintiff, in suing to recover possession of his property, is not carrying out the illegal transaction, but is seeking to put every one, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor v. Bowers* (1) and the authorities upon which that decision

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is based clearly establish this. *Symes v. Hughes* (1) and *In re Great Berlin Steamboat Co.* (2) are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of Fry, L. J., in *Kearley v. Thomson* (3).

Mr. Upjohn contended that, where there is a fraudulent arrangement to defeat creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, would amount to good overt act of the conspiracy, and property transferred by the debtor to his co-conspirator cannot be recovered back. This, however, is obviously not the law. In conspiracy the concert or agreement of the two minds is the offence, the overt act is but the outward and visible evidence of it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless, but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside as a preliminary to his obtaining the relief he claims. The 144th, and not the 91st, article in the second schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Messrs. A. H. Arnould & Son.—Solicitors for the Appellant.

Messrs. Sanderson & Co.—Solicitors for the first Respondent :

Messrs. Adkin, Lee and Eddis.—Solicitors for the second and third Respondents did not appear.

J. M. P.

Appeal dismissed.

(1) (1870) L. R. 9 Eq. 475 at 479.

(2) (1884) 26 Ch. D. 616.

(3) (1890) 24 B. D. 742.

APPELLATE CIVIL.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and
Mr. Justice Coxe.

JOGENDRA NATH SIRKAR AND OTHERS

v.

GOBINDA CHANDRA DUTT.*

Civil Procedure Code (Act XIV of 1882), Sec. 244—Shebait, personal decree against—Claim to attached property on behalf of idol, if triable in execution proceedings.

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An objection of a shebait on behalf of the idol to the attachment of immovable property in execution of a decree passed against him personally is triable under section 244 of the Code of Civil Procedure.

Punchanun Bundopadhya v. Rabia Bibi(1) followed.

Appeal by the Judgment-debtors.

Application for execution of a decree.

The facts of the case as stated in the judgment of the first Court are as follows :

"The decree sought to be executed was passed in a rent suit. It was a suit for arrears of rent of a *darputni taluk* known as Lot Ranjapur, which certain persons named Poorna Chandra Chakravarti &c., used to hold under the present opposite party, Gobinda Chandra Dutt and his co-sharer Romoni Dassi. The suit was instituted by Romoni Dassi, and Gobind Dutt was only a pro-forma defendant in it originally. Subsequently Gobinda was made a co-plaintiff with his consent. The claim in the plaint was for the entire arrears due to both Romoni and Gobinda. The old *darputnidars* were at first the principal defendants in the plaint. The present applicants Jogendra Chandra and his brothers were made defendants in that suit on their own application as the *darputni* had been purchased by their father from its old proprietors the *Chakravatis*. The suit was ultimately decreed against Jogendra and his brother only. In the decree there was a declaration to the effect that a half share of the claim decreed was due to Romoni and that the other half only was due to

* Appeal from Appellate Order No. 275 of 1907, against the order of F. Roe Esq., District Judge of Hooghly, dated the 17th April 1907, affirming that of Babu Sripati Chatterjee, Subordinate Judge of Hooghly, dated the 18th February 1907.

(1) (1890) I. L. R. 17 Cal. 711 (F. B.)

[For similar view, See 8 C. W. N. 353, I. L. R. 27 Cal. 34, 12 C. W. N. 310 I. L. R. 28 All. 51 and I. L. R. 30 Mad. 215, and for contrary view I. L. R. 28 Bom. 458, I. L. R. 23 Mad. 195 (F. B.) and 18 M. L. J. 21 and 12 C. W. N. 308; See also 6 C. W. 63,—Rep.]

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Gobinda, and that the entire amount of the costs allowed was due to Romoni alone. Romoni alone executed the decree. The *darputni* in arrear was attached and proclaimed for sale. Her claim was satisfied and Gobinda now sought to recover his dues under the very same decree by attachment and sale of the *darputni taluk*. The debtors Jogendra and his brother then said that the *darputni* was not a property of their own, that it was acquired by their father for the benefit of his Thakur Kasinath, as the Thakur was not made a defendant in the suit, the taluk which was his property could not be seized in execution. So they had put in two applications, one of which was under section 244, Civil Procedure Code, in their capacity of judgment debtors, and the other under section 278, Civil Procedure Code, as *shebait* of the Thakur."

The learned Subordinate Judge rejected both applications, the application under section 278, Civil Procedure Code, on the ground that the decree was a rent decree, and the application under section 244, Civil Procedure Code, *first*, because he was not satisfied that the taluk was really the property of the Thakur and *secondly*, because the judgment debtors allowed themselves to be made parties in their personal capacity and so it did not lie in their mouth to say that the *darputni* was not their property, but the property of the Thakur. The judgment-debtors then preferred an appeal to the District Judge who observed as follows :

"The judgment-debtors are not at liberty in their personal capacity to say that the property is *debutter* property. If there is any allegation to this effect, it must be made specifically by the idol who will then be responsible for costs if he fails." He dismissed the appeal.

Babus Mohendra Nath Roy and Krishna Prosad Sarbadhicary for the Appellants.

Babu Braja Lal Chakravarti for the Respondent.

C. A. V.

The judgments of the Court were as follows :

Maclean C. J.—It is not very easy from the terms of the judgment of the District Judge to ascertain what the appeal is about. But from the terms of the grounds of appeal and the arguments addressed to us, the question appears to be whether the appellants could properly raise the question they desired to raise, on an application under section 244 of the Code of Civil Procedure. It appears that a decree in the suit was passed against them personally : that in execution of that decree attachment was

issued, or was about to be issued against certain property : the appellants say that the property does not belong to them personally, but that it belongs to them as shebait of an idol : that, as such, it is not liable to attachment, and they contend that this question is properly triable under section 244. They made two applications, one under section 244, the other under section 278. There appears to be some inconsistency in making these two applications. Both have been dismissed so far as the order was made under section 278, admittedly there is no appeal : but they say that, so far as it was an application under section 244, there is an appeal. This is what we have to decide, and the question is whether the question could be determined under section 244. As the appellants were parties to the suit, we think the case fell within section 244. There has been some difference of judicial opinion upon the point, but we need not go through the cases as the question seems to be concluded, in principle by the Full Bench decision of this Court, in the case of *Punchanun Bundo-padhya v. Rabia Bibi* (1).

I do not consider that the appellants have lost any rights *qua* their application under section 244, because they made a mistake in applying under section 278.

The appeal must be allowed with costs : and the case must go back to be tried out on its merits. I have assumed throughout that the appellants are the only *shebait*s.

We assess the hearing fee at 3 gold mohurs.

Coxe J.—I agree.

A. T. M.

Appeal allowed ; case remanded.

(1) (1890) I. L. R. 17 Calc. 711.

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*Before Sir Francis William Maclean, K. C. I. E., Chief Justice
and Mr. Justice Coxe.*

HARA KUMARI DASÍ

v.

MOHIM CHANDRA SARKAR.*

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January, 20.

Will, construction of—Will, operative part of—"Possessor of properties," meaning of—Widow, Hindu—Life-interest—Absolute gift—Powers of alienation by gift or sale—Gift over—Limitations imposed by will, effect of—Construction, rule of

Where in the recitals of a will, a Hindu testator mentioned that he had no sons but only one daughter, whom he had given in marriage, but it was his duty to maintain her, and that his wife, to whom the will was addressed, was entitled to the property to be left by him, and then in the operative part of the will directed as follows :—

"Should I die, you (his wife) shall under this will, become possessor of my properties &c.,..... you will have the right and power to alienate by gift or sale all the movable and immovable properties....."

"My daughter shall become entitled to and possessor of whatever properties will remain after your death, and she shall enjoy the same. The said daughter shall have the same rights in the aforesaid properties as you have, and he to whom my said daughter may willingly give away these properties, shall possess the same and enjoy them"

Held, (upon a construction of the will).—That there was not, in so many words, any clear and absolute gift to the widow, that the widow took for life, with a power of alienation, but to the extent to which such power was not exercised that the daughter similarly took the property and that she was to have the "same rights in the properties," as the widow.

The Court, in construing a will, must give effect to all the words of the will, so far as it can.

Appeal by the Defendant.

Suit for the construction of a will.

The facts of the case, so far as they are material to this report! appear from the judgment.

Babus Golap Chandra Sarkar and Shyama Charan Roy for the Appellants.

Dr. Rash Behary Ghose and Babu Debendra Nath Bagchi for the Respondents.

The judgments of the Court were as follows :

Maclean C. J.—This is a very curious suit. It is a suit asking to have the will of one Ananda Lal Sarkar construed. But in his plaint, the plaintiff sets up very prominently that the

* Appeal from Original Decree No. 33 of 1906 against a decree of Babu Jogendra Nath Deb, Additional Subordinate Judge, 2nd Court, 24 pergunnahs dated the 25th September 1905.

will is a forgery and an appeal was, until recently, pending in this Court to have the probate revoked. If the suit had come before me, I should have dismissed it summarily. But we are told that the appeal to this Court which was existing when the decision now appealed against was given, has since been withdrawn. So we will deal with the question of the construction upon the merits.

The question turns upon the construction of a very short will dated the 10th of March 1866, and, we are told, the testator died two or three days afterwards. After certain recitals as to his property, the material portion of the will runs as follows : "I have no son, and I have only one daughter Sremati Hara Kumari Dasi," (who is the present appellant). "Although I have given her in marriage, still it is my duty to maintain her." Pausing there for a moment, these words would appear to indicate that the testator proposed to make some provision by his will for his daughter. Then he goes on : "I, therefore, of my own free will, and in sound health and in possession of my senses, execute this will in your favour." The will purports to be addressed to his wife : "You are my legally married wife, and entitled to the property to be left by me." Up to this point the contents of the will are in the nature of recitals. I now come to that which may be regarded as the operative part of the will. "Should I, on a sudden, die at Benares, you shall, under this will, become possessor of my properties &c, and perform my *sradh* &c., at a suitable cost ; and for the benefit of my soul, you shall purchase a house at this Benares, and establish a *Mahadev* in it, and perform its *sheba* and service &c., and you shall fix a suitable allowance as *prandmi* for my spiritual guide." Pausing there, the expression "*possessor* of my properties" is not inconsistent with the view that the widow was only to have a life-interest in the property. There is, so far as I have read, no clear and absolute gift to the widow. Then came the words upon which reliance has been placed by the respondent, "you will have the right and power to alienate by gift or sale all the aforesaid movable and immovable properties." If the will had stopped there, it might have been difficult to say that the widow did not take the property absolutely. But very important words follow, and we must give effect to all the words of the will, so far as we can. "My daughter, Srimati Hara Kumari Dasi shall become entitled to, and possessor of whatever properties will remain after your death, and she shall enjoy the same,

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keeping up and maintaining the aforesaid *shebas* &c". Later on he says, "The said daughter shall have the same rights in the aforesaid properties as you have, and he to whom my said daughter may willingly give away those properties, shall possess the same, and enjoy them, keeping up and maintaining the *sheba* &c." The question is what interest did the widow take. For the appellant, it is contended that she only took a life-interest with a power which in England would be regarded as a power of appointment to alienate by gift or sale the property passing by the will. This is the view pleaded by the plaintiff in paragraph 5 of the plaint. "According to the directions" he says "contained in the alleged will, the widow Ichhamayi had only a life-estate in the properties mentioned in the will." If the will had stopped at the words "movable and immovable properties," as I have already pointed out, it might have been difficult to say that the widow did not take absolutely, but we cannot eliminate from the will all the words which follow in favour of the daughter. It is clear, the daughter was to be "entitled" to and 'possessor' of what properties will remain after your death" and she was to "enjoy" the same. Are these words to go for nothing? There is not, in so many words, any clear and absolute gift to the widow, and we can give effect to all the words in the will by holding that the widow took for life, with a power of alienation, but to the extent to which such power was not exercised, the daughter similarly took the property. She was to have the "same rights in the properties" as the widow. If the respondent's argument prevail, she takes nothing. We think this is the true construction of the will. It is only in this way that we can give proper effect to the words that the daughter "shall become entitled to and possessor of whatever properties will remain after her death and she shall enjoy the same." We cannot strike these words out of the will. In my opinion, the view of the lower Court that the widow took an absolute interest and the daughter took nothing is mistaken. The decree of the Court below must be discharged and in the circumstances, the suit must be dismissed with costs including the costs of the appeal.

Coxe J.—I agree.

B. M.

Appeal allowed.

*Before Sir Francis W. Maclean, K. C. I. E., Chief Justice, and
Mr. Justice Doss.*

R. BELCHAMBERS, ADMINISTRATOR *pendente lite*
TO THE ESTATE OF LATE GOPAL LAL SEAL

v.

SARAT CHUNDER GHOSH AND OTHERS.*

*Civil Procedure Code (XIV of 1882), section 257A—Agreement to pay decretal
amount by instalments—Suit to enforce agreement, if maintainable.*

An agreement between a decree-holder and a judgment-debtor without the sanction of the Court whereby the former agreed to take the decretal amount by instalments, after allowing certain remission and where the latter executed a bond hypothecating certain property and which contained a stipulation that the decree-holder would be competent to realize the amount in execution of decree on default of payment of two consecutive instalments, can be enforced by a suit. The provision as to giving time to execute the decree is not illegal, though it may be incapable of enforcement for want of sanction.

Appeal by the Plaintiff.

Suit on instalment bond.

The facts of the case appear sufficiently from the judgment.

*Babus Krishna Prasad Sarbadhikary, Chandra Sekhar
Banerji and Ratan Chand Boral*, for the Appellant.

Babus Mahendra Nath Roy and Mohini Mohan Chatterji
for the Respondents. C. A. V.

The judgment of the Court was as follows :

Maclean C. J.—This is a suit by an Administrator *pendente lite* to the estate of one Babu Gopal Lal Seal, deceased, upon a *kistbundi* or instalment bond. It appears that Babu Gopal Lal Seal had obtained two decrees in this Court against the defendants in certain rent suits, on account of arrears of certain *putni mehal* ; that the property was proclaimed for sale for a sum of Rupees 11,549 odd, and the sale was fixed for the 16th July, 1898. By the bond in question dated the 11th of Assin, 1305, after reciting that the sum of Rupees 11,549 odd was due under the decrees and that they were unable to pay the money at once, and that Babu Gopal Lal Seal had agreed to take the sum of Rupees 9,115 odd by instalments, after allowing a remission of Rupees 2,434 from the aforesaid amount, the defendants executed the bond, and as security hypothecated certain properties mentioned in the schedule. It was, in fact, a mortgage bond. Then there was a provision that, if there were default

* Appeal from Original Decree No. 421 of 1906, against the decree of Babu Sripati Chatterjee, Subordinate Judge, Hooghly, dated the 26th June, 1906.

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in payment of the instalments, it should be competent to Babu Gopal Lal Seal to realise the money in execution of the decrees, and in default of payment of two consecutive instalments, the entire amount, including the amount remitted, should be realizable in execution of the decree. The defendants have only paid about Rs. 800 under the bond, and the execution of the decree has become barred by limitation. A substantial sum is due under the bond. The plaintiff, as representative of Babu Gopal Lal Seal, sues for that amount, and for the realization of the sum out of the hypothecated property. The only defence that has been submitted to us is that the mortgage bond is void under section 257 A of the Code of Civil Procedure. The Court below took this view and dismissed the suit : and the only question argued before us on this appeal was whether that view was correct. Section 257A, so far as it is material, runs as follows : " Every agreement to give time for the satisfaction of a judgment-debt shall be void unless it is made for consideration, and with the sanction of the Court which passed the decree, and such Court deems the consideration to be under the circumstances reasonable." It is urged that the bond was a mere agreement to give time for the satisfaction of the debt, and as it was made without the sanction of the Court, it is absolutely void. In the absence of authority upon the point, I should have been disposed to think that what is meant by an agreement to give time in that section, is a mere agreement between the decree-holder and the judgment-debtor to give time for the satisfaction of the debt, and that one object of the section was to obviate discussion, as to whether or not there had been such an extension of time given, as to which there might be a considerable conflict of oral evidence : and also as some Judges think, to protect the debtor, and, to avoid this, the Legislature determined that any such agreement should be void, unless made with the sanction of the Court. It is noticeable here that the bond was given not by the judgment-debtors but by two of them only, as executors of the deceased tenant. The question then is : Is this bond an agreement to give time within the meaning of the section ? *Prima facie* it is an ordinary instalment bond hypothecating certain property for the payment of those instalments. But it is said that the provision at the end of the deed for keeping alive the right to execute the decree, makes it an agreement to give time within the meaning of section 257 A. On the face of it, it is more than that : it is a

contract between the parties that, for the consideration set forth, the defendants hypothecated certain property to secure the balance of a certain debt. There is a great diversity of judicial opinion upon the point. In the Calcutta and Madras High Courts (subject to a recent decision in the latter Court) the view taken is, that such a bond is not void under section 257A and that it can be enforced in a separate suit, whilst, the High Courts of Bombay and Allahabad appear to have entertained an opposite view. In the case of *Jhabar Mahomed v. Modan Sonahar* (1), it was distinctly held that an instalment bond of the present nature was not an agreement to give time for the satisfaction of a judgment-debt within the meaning of section 257A of the Code of Civil Procedure, and reference was made to an earlier judgment of this Court in the case of *Gunamani Dasi v. Prankishori Dasi* (2). This view was further emphasized in the case of *Hukum Chand Oswal v. Taharunnissa Bibi* (3), where reliance was placed upon the cases I have previously cited, and upon a decision of the Madras High Court in the case of *Sellamayyan v. Muthan* (4) and a decision of the Allahabad High Court in the case of *Ramghulam v. Janki Rai* (5). The same principle was applied in the case of *Hurkissen Dass Serowgee v. Nibaran Chander Banerjee* (6), and again in the case of *Fugi Kamti v. Annai Bhutta* (7), where it was held that the intention of the section was to render such agreement void, only so far as it affects the right to execute the decree. In the case of *Bank of Bengal v. Vyabhoy Gangji* (8), it was held that, where such an agreement to give time, not sanctioned by the Court as required by section 257 A, found part of the consideration for the bond, and has actually been enjoyed by the obligee of the bond, such consideration not being in its nature illegal and not having as a fact failed, there is no reason why the obligor should not enforce the terms of the bond. In the case of *Kesu Shivaram Marwari v. Genu Babaji Powar* (9), it was held that the provisions of section 257A do not include, within their scope, an agreement between a judgment-creditor and a person other than the judgment-debtor, whereby the latter, in consideration of the postponement of the execution of the decree against the judgment-debtor, undertakes to pay to the judgment-creditor a certain sum

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(1) (1885) I. L. R. 11 Calc. 671.

(2) (1870) 5 B. L. R. 223.

(3) (1889) I. B. R. 16 Calc. 504.

(4) (1888) I. L. R. 12 Mad. 61.

(5) (1884) I. L. R. 7 All. 124.

(6) (1901) 6 C. W. N. 27.

(7) (1893) I. L. R. 17 Mad. 382.

(8) (1891) I. L. R. 16 Bom. 618.

(9) (1898) I. L. R. 23 Bom. 502.

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of money. Here, as I have pointed out, the obligees of the bond were not the judgment-debtors. In the case of *Tukaram v. Anantbhat* (1), it was held that the true test was whether the mortgage bond suspended the right to execute the decree, or whether it put an end to the remedy on the decree, and substituted the mortgage bond. If it amounted to an actual and present satisfaction of the judgment, it is not an agreement to give time for the satisfaction of a judgment-debt, and does not fall within section 257A of the Civil Procedure Code. In that case all the authorities were carefully reviewed by the Court. This view was adopted by the Madras High Court in the case of *Venkata Subramania Ayyar v. Koran Kannan Ahmed* (2). All the cases were reviewed in a Full Bench case of the Allahabad High Court, *Lalji Singh v. Gaya Singh* (3), where it was held that an agreement, whereby a decree is adjusted, and so rendered unenforceable, is not within the purview of section 257A of the Code of Civil Procedure.

These are substantially all the authorities on the point, and as the result of these authorities, and looking at the language of the section, I think the plaintiff is entitled to maintain the suit. The provision as to giving time to execute the decree is not illegal, though it may be incapable of enforcement, as the agreement was not made with the sanction of the Court (*Bank of Bengal v. Vyabhoy Gangji* (4)). In point of fact, however, the plaintiff has performed that part of the agreement, and although that part of the agreement may not be capable of enforcement, there is nothing to taint the rest of the agreement with illegality, or to prevent the plaintiff from suing upon it.

The appeal must be allowed with costs.

Doss J.—I agree.

A. T. M.

Appeal allowed.

(1) (1900) I. L. R. 25 Bom. 252.

(3) (1903) I. L. R. 25 All. 317.

(2) (1902) I. L. R. 26 Mad. 19.

(4) (1891) I. L. R. 16 Bom. 618 (625).

CIVIL RULE.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

LEO. MOORE

v.

MANORANJAN GUHA.*

CIVIL.

1908.

January, 14, 17.

Specific Relief Act (1 of 1877), Sec. 9—"Dispossessed otherwise than in due course of law, meaning of."—Criminal Procedure Code (Act V of 1898), Sec. 145, effect of an order under—If dispossession within the meaning of Sec. 9, Act I of 1877.

The plaintiff sued for recovery of possession of a mica mine under Sec. 9 of the Specific Relief Act, on the allegation that he was dispossessed by the defendant, therefrom on the 13th February, 1907, in consequence of the final order of the Magistrate of Giridih, passed under Sec. 145 of the Criminal Procedure Code, on the 11th February, 1907, after the property had been in attachment under the proviso to clause (4) of the section :

Held, that, under these circumstances, the plaintiff could not be said to have been dispossessed otherwise than in due course of law, and the plaintiff is, therefore, not entitled to maintain an action under Sec. 9 of the Specific Relief Act.

Nagappa v. Sayed Bradrudin (1) and Chytun Chunder v. Brojohant (2) distinguished.

Although Sec. 145 of the Criminal Procedure Code does not expressly authorize the Court to put the successful party into possession, the effect of it is to entitle him to take it.

Per Mookerjee, J.—A matter may be considered to have happened in due course of law, if it is the result and operation of the law, invoked by the ordinary method of any judicial proceeding.

Rudrappa v. Narsingrao Ram Chandra Heblikar (3) considered and relied on.

The view that the effect of an order under Sec. 145 of the Criminal Procedure Code is to entitle the successful party to take possession is consistent with the observations of the Judicial Committee in *Dinomoni Choudhuran v. Brojomohini Choudhuran (4)*, and by the case of *Kalee Chunder v. Adoo Shaiik (5)*.

Rule obtained by the Defendant for setting aside the decree of the lower Court.

Suit for recovery of possession under Sec. 9 of the Specific Relief Act.

The material facts of the case will appear sufficiently from the judgments.

* Civil Rule No. 3679 of 1907 against a decree of Dr. V. Rai, Munsiff of Giridih, dated the 4th October, 1907.

(1) (1901) I. L. R. 26 Bom. 353.

(3) (1904) I. L. R. 29 Bom. 213.

(2) (1878) 20 W. R. 12.

(4) (1901) I. L. R. 29 Calo. 187, 199.

(5) (1868) 9 W. R. 602.

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Babu Baranasibasi Mukerji for the Petitioner.
Babu Gunada Charan Sen for the Opposite party.

C. A. V.

The judgments of the Court were as follows :

Stephen J.—This is a Rule to show cause why a decree passed by the Munsiff of Giridih in a suit brought under section 9 of the Specific Relief Act should not be set aside, on the ground that the dispossession complained of being the result of a proceeding under section 145, Criminal Procedure Code, no action under any section of the Specific Relief Act would lie. The facts of the case are as follows : The land in dispute is a mica mine the title to which is disputed by the parties. The mine cannot be worked during the rains ; from the 5th to the 26th October, 1906, it was in the possession of the plaintiff. On the 26th he was dispossessed by the defendant ; on the 3rd November a breach of the peace led to proceedings under section 145, Criminal Procedure Code ; when the order under section 145 (1), was made does not appear, but it must have been between 3rd. November and the 10th. November when the property was attached by the Court under section 145 (4). The proceedings terminated on 2nd. February, 1907, when the Magistrate found that the present defendant "is in possession of the mine," and we must suppose that an order was consequently drawn up in accordance with Form No. 23 of Schedule V of the Criminal Procedure Code, declaring that the defendant was in possession and entitled to retain such possession until ousted in due course of law. Could the Munsiff hear the case before him which was instituted after the order had been made? The plaintiff's right under the Specific Relief Act, section 9, arises if he was dispossessed otherwise than in due course of law. The dispossession on which he based his suit was that which took place on the 13th February, 1907, in consequence of the order under section 145. I find it impossible to suppose that if the plaintiff was dispossessed on the 13th February, which seems to me doubtful, as the property was then attached by the Court, the defendant's dispossession was otherwise than in due course of law. It is true that section 145 contains no provision that a party in whose favour an order is made under the section is to be put into possession ; but if he is declared entitled to possession and disturbance of his possession is forbidden, no one has a right to interfere with his taking possession, and he is therefore entitled to take it.

We have been referred to the case of *Nagappa v. Sayed*

Badrudin (1), as an authority to show that the Munsiff had jurisdiction in this case in spite of the order under section 145. In that case a Mamlatdar acting under Act III of 1876, Bombay Acts, sections 3 and 10, refused to exercise a jurisdiction similar to that conferred by section 9 of the Specific Relief Act, and it was held that he was wrong. In that case, however, the date of the alleged act of dispossession was anterior to proceedings under section 145 or at all events to the date mentioned in the order under section 145 (1), so that a decision of the question that it was sought to raise in issue could not run counter to the effect of the order under section 145 (6) and the decision cannot be taken as showing that a dispossession under such an order is a dispossession otherwise than in due course of law under section 9, Specific Relief Act. The decision in the matter of *Chytun Chunder v. Brojokant* (2) is to a similar effect, and is not relevant to the present case for the same reasons.

The result is, that the Rule must be made absolute and the decree of the Munsiff set aside. The petitioner is entitled to his costs in this Court, which we assess at 2 gold mohurs and his costs in the Court below.

Mookerjee J.—The order, which we are invited to set aside in the exercise of our revisional jurisdiction, was made by the Court below in favour of the plaintiff, opposite party in a possessory suit commenced by him under section 9 of the Specific Relief Act against the defendant, petitioner for the recovery of a mica mine. The facts so far as they can be gathered from the record appear to be as follows: The parties to the present proceeding have had for some time past a dispute as regards the title and possession of the mine in question. Sometime in November, 1906, proceedings were taken by the Magistrate of Giridih under section 145 of the Code of Criminal Procedure, and on the 9th of November, 1906, the mine was attached under the second proviso to sub-section 4 of that section. On the 11th of February, 1907, the Magistrate held that the present petitioner, Moore, was in possession at the date of the initial order under section 145 and made the final order in his favour, namely, that he must be maintained in possession until evicted therefrom in due course of law. On the 18th of April, 1907, the plaintiff who had been defeated in the proceedings under section 145 of the Code of Criminal Procedure, instituted the present action for recovery of possession under section 9 of the Specific Relief Act upon the

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(1) (1901) I. L. R. 26 Bom. 353.

(2) (1873) 20 W. R. 12.

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allegation that he had been unlawfully dispossessed by Moore on the 13th of February, 1907. The claim was resisted not only on the merits but also on the ground that the Court had no jurisdiction to entertain the suit under section 9 of the Specific Relief Act, inasmuch as the plaintiff, if even in possession, had not been dispossessed otherwise than in due course of law. The Munsiff over-ruled this objection, found on the merits in favour of the plaintiff and made a decree in his favour. It is this decree which we are now invited to set aside.

It has been contended by the learned vakil for the petitioner that, if the plaintiff was at any time in possession, he was dispossessed in due course of law, inasmuch as he lost possession as a necessary result of the proceedings under section 145 of the Code of Criminal Procedure which terminated in favour of the petitioner. It has been argued on the other hand by the learned vakil for the opposite party, that it was quite competent to the Civil Court to entertain the suit under section 9 of the Specific Relief Act, inasmuch as section 145 of the Code of Criminal Procedure does not entitle the successful party to be placed in possession by the Court, and, consequently, the plaintiff has lost possession otherwise than in due course of law. In support of this view, reliance has been placed upon the decision of the Bombay High Court in *Nagappa v. Sayed Badrudin* (1). After careful consideration of the arguments which have been addressed to us on both sides, I am of opinion that the decision upon which reliance is placed is clearly distinguishable, and that in the events which have happened, the plaintiff cannot be said to have been dispossessed otherwise than in due course of law, and is, consequently, not entitled to maintain an action under section 9 of the Specific Relief Act.

It was pointed out by the learned Judges of the Bombay High Court in *Rudrappa v. Narsing Rao* (2), that in order to enable the phrase "in due course of law" to be predicated of any matter, it is essential, speaking generally, that the thing should have been submitted to the consideration and pronouncement of the law, and "due course of law" means the regular normal process and effect of the law operating on a matter which has been brought before it for adjudication. No doubt, in a later passage the learned Judges observe that the words must be read in their primary sense as referring to the process and operation of the law invoked by the ordinary method of a Civil

(1) (1901) I. L. R. 26 Bom. 353

(2) (1904) I. L. R. 29 Bom. 213.

suit. An examination of the judgment as a whole shows, however, that the learned Judges did not intend to use "Civil suit" in contradistinction to a "Criminal proceeding" and, in my opinion, a matter may be said to have happened in due course of law, if it is the result and operation of the law invoked by the ordinary method of any judicial proceeding. Judged from this point of view, it seems to be reasonably plain that the dispossession of the plaintiff cannot be said to have happened otherwise than in due course of law. It is perfectly true that section 145 of the Code of Criminal Procedure does not expressly authorize the Court to place the successful party in possession, but its practical result is the same. As was pointed out by Mr. Justice Phear in *Kalee Chunder v. Adoo Shaikh* (1), the section provides a special remedy for a particular kind of grievance inasmuch as its effect is to replace in possession a person who has been evicted otherwise than in due course of law from landed property of which he had been in undisturbed possession and thus to prevent a powerful person from shifting the burden of proof from himself to another less able to support it. That this must be so, is obvious from the circumstance that a disobedience of the order made by Magistrate under section 145 of the Code of Criminal Procedure is punishable under section 188 of the Indian Penal Code; there is consequently an effective sanction provided by law and the result of an order favourable to one party is that his unsuccessful opponent is practically deprived of possession. This is undoubtedly what happened in this particular case. On the 9th November 1906, the property was attached, with the consequence that whoever might have been in possession at the moment, was dispossessed. On the 11th of February, 1907, the Magistrate made an order in favour of the present petitioner. The result was that the attachment forthwith ceased to be operative and under the authority of the order of the Magistrate the petitioner entered into possession. Even; if, therefore, it be conceded that the plaintiff was in possession when the land was attached by the Magistrate, it must be held that the defendant dispossessed him in due course of law, as the dispossession was the natural result of the favourable order which he obtained from the Magistrate. Under these circumstances, it can hardly be contended that it is open to the unsuccessful party in the Criminal Court to institute a proceeding before the Civil Court for recovery of possession

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upon the allegation that he has been dispossessed as a result of the order of the Criminal Court. This view is perfectly consistent with the observations of their Lordships of the Judicial Committee in *Dinomoni Choudhurani v. Brojo Mohini Choudhurani* (1), where Lord Lindley pointed out that although possession under an order of a Magistrate (under section 145 of the Code of Criminal Procedure) confers no title, the effect of possession remains and the person in possession can only be evicted by a person who can prove a better right to the possession himself. The case of *Nagappa v. Sayad Badrudin* (2), is clearly distinguishable and is in no way inconsistent with the view indicated above. In that case, a *mamlatdar* who had jurisdiction to try possessory suits under section 3 of Bombay Act III of 1876 was called upon to try a suit for recovery of possession which was commenced on the 6th of March, 1901, upon the allegation that the defendant had wrongfully dispossessed the plaintiff on the 10th October, 1900. On the 20th October, 1900, a Magistrate had made the initial order under section 145 of the Criminal Procedure Code and on the 22nd December, 1900, had passed the final order under that section in favour of the defendant in the possessory suit. It appears to have been contended before the *mamlatdar* that he had no jurisdiction to hear the suit by virtue of the order of the Magistrate made on the 22nd December, 1900. This contention was allowed to prevail. The High Court, however, held that the view was erroneous and that the *mamlatdar* had improperly refused jurisdiction. The learned Judges pointed out that the effect of the order of the Magistrate was to maintain the defendant in possession on the ground that he had established his possession on the date of the initial order, that is, the 22nd October, 1900, but that this did not in any way affect the question of possession on the 10th October, 1900. Under these circumstances, it could not be successfully contended that the *mamlatdar* had no jurisdiction to determine the question of possession on the latter date and to make a decree in favour of the successful party under Bombay Act III of 1876. In the case before us the facts are essentially different. Here the Court had possession of the property between the 9th of November 1906 and the 11th of February, 1907. As a result of the order made in favour of the defendant on the latter date, he entered into possession two days later. It is difficult to perceive how such

(1) (1901) I. L. R. 29 Calc. 187 at 199. (2) (1901) I. L. R. 26 Bom. 353.

entry can be said to be unlawful and how the dispossession of the plaintiff can be regarded as a dispossession otherwise than in due course of law. It may be added that the case of *Chytun Chunder v. Brojo Kant Roy* (1), is also distinguishable on somewhat similar grounds. In that case an action was commenced under section 15 of Act XIV of 1859. Subsequently, Criminal proceedings were instituted under section 318 of Act XXV of 1861. The party in whose favour the Magistrate made his award contended in the Court which had seizin of the possessory suit that its jurisdiction was ousted. This objection was overruled and in my opinion, the Court could not have adopted any other course. Not only had the two Courts, Criminal and Civil, to determine the question of possession as it stood upon two different dates, but the Civil Court was invited to withhold its hand by reason of an award made by the Criminal Court in a proceeding which had been instituted subsequent to the commencement of the Civil suit. Such a position as this is obviously untenable.

The result, therefore, is that this Rule ought to be made absolute and the order of the Court below discharged with costs both here and in the Court below.

B. M.

Rule made absolute.

(1) (1873) 20 W. R. 12.

Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and Mr. Justice Coxe.

HIRAMOTI DASSYA

v.

ANNODA PROSAD GHOSH AND ANOTHER.*

Ejectment—Onus—Tenure-holder—Tenure, non-permanent, if transferable—Transfer of Property Act (IV of 1882), Sec. 2, effect of—Bengal Tenancy Act (VIII of 1885), Sec. 11.

In a suit in ejectment, where the defence sets up a tenure by right of purchase from the former tenant, if the plaintiff has proved that he is the owner of the land, it lies upon the defendant to make out that he is a tenure-holder and is entitled to remain thereon.

The provisions of the Transfer of Property Act do not apply to a tenancy created before the Act came into force. A non-permanent tenure created before the passing of the Transfer of Property Act is not transferable.

Hari Nath Karmakar v. Raj Chandra Karmakar (1) and *Madhu Sudan Sen v. Kamini Kant Sen* (2) referred to.

* Appeal from Appellate Decree No. 2031 of 1905, against the decree of B. C. Mitra, Esq., District Judge of Jessore, dated the 26th July 1905, reversing that of Babu Norendra Kriebna Dutta, Munsiff of Khulna, dated the 17th December 1904.

(1) (1897) 2 C. W. N. 122.

(2) (1905) I. L. R. 32 Calc. 1023.

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Ghosh.

Semle : Section 11 of the Bengal Tenancy Act imports that non-permanent tenures are not to be regarded as transferable.

Appeal by Defendant No. 6.

Suit for *khas* possession.

The facts and arguments appear sufficiently from the judgment.

The Advocate-General (Mr. O'Kinealy), Mr. Norton, Babus Lal Mohun Doss, Jnanendranath Bose and Ram Ratan Chatterjee for the Appellant.

Mr. Hill, Dr. Rash Behary Ghose, Babus Joges Chunder Roy, Rajender Chunder Guha and Ratan Chand Boral for the Respondents.

C. A. V.

The judgment of the Court was as follows:

Maclean C. J.—This is a suit for *khas* possession, and the lower appellate Court has given a decree in the plaintiffs' favour. The plaintiffs are the owners of the land in dispute, the appellant claims to be a tenure holder of the land under them. The land was the *jama* of one Bishu Sheik; he sold it to the appellant. The plaintiffs say, Bishu Sheik was only an occupancy raiyat, and had no transferable right. The appellant says, he was a permanent tenure-holder, and that the tenure was transferable. Both Courts have found, under the statutory presumption of the Bengal Tenancy Act, the land being over 100 bighas in extent, that the tenancy was a tenure, and not an occupancy holding. The lower appellate Court has, however, held that it was not a permanent tenure, and so, not transferable, and has consequently given the plaintiffs, a decree for *khas* possession.

In these circumstances, two points have been raised before us: (1) that the Court below was wrong in throwing the *onus* of proving the nature of his tenancy on the appellant; (2) that whether the tenure were permanent or not, it was transferable.

On the first point, the plaintiffs have satisfactorily proved that they are the owners of the land, it lies, then, upon the appellant to show that she is entitled to remain there, in other words, to make out her alleged title as a tenure holder. We think the authorities are clear upon this point.

As regards the second point, no authority has been adduced to show that a non-permanent tenure is transferable. Reliance, however, is placed on section 6 and section 108 (sub section j) of the Transfer of Property Act. But I do not think that Act

applies to the present case. Here the tenure was created in 1864: the Transfer of Property Act was passed in 1882. Under section 2 of that Act nothing therein contained shall be deemed to affect any right or liability arising out of a legal relation constituted before the Act came into force. The legal relation in this case was constituted in 1864: and if at that time there was no right to transfer a non-permanent tenure, no such right is conferred by the Transfer of Property Act. This view gains support from the case of *Hari Nath Karmakar v. Raj Chandra Karmakar* (1) and the case of *Modhu Sudan Sen. v. Kamini Kant Sen* (2).

As then the appellant has failed to show that the tenure, apart from the Transfer of Property Act, is transferable, her case must fail. It is noticeable that section 11 of the Bengal Tenancy Act enacts that every permanent tenure shall, subject to the provisions of the Act be capable of being transferred: nothing, however, is said about non-permanent tenures. If it had been also intended to make them transferable, we might have expected the legislature to have said so.

This section seems to import that non-permanent tenures were not to be regarded as transferable. Occupancy rights, it may be remarked, are only transferable by custom. The appeal fails and must be dismissed with costs.

Coxe J.—I agree.

A. T. M.

Appeal dismissed.

(1) (1897) 2 C. W. N. 122.

(2) (1905) I. L. R. 32 Calc. 1023.

Before Sir Francis W. Maulean, K. C. I. E., Chief Justice and Mr. Justice Doss.

KRISHNA PADA DUTT AND ANOTHER

v.

SECRETARY OF STATE FOR INDIA IN COUNCIL

AND ANOTHER.*

Succession certificate—Sister's daughter's son, if heir—Dayabhaga School of Hindu Law.

Sister's daughter's son is not *prima facie* an heir under the Dayabhaga Law and is, therefore, not entitled to get a succession certificate under Act VII of 1889.

Umaid Bahadur v. Udoi Chand (1) explained.

* Appeal from Original Order No. 83 of 1907 against the order of F. Roe, Esq., District Judge of Hooghly, dated the 20th December 1906.

(1) (1880) I. L. R. 6 Calc. 119.

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for India in Council.

Appeal by the Petitioners.

Application under the Succession Certificate Act for a certificate by the daughter of the sister of the deceased and the son of that daughter.

The facts and arguments appear sufficiently from the judgment.

Babu Dwarka Nath Mitra for the Appellants.

Babus Ram Charan Mitra and Brojo Lal Chuckerbutty for the Respondent.

C. A. V.

The judgment of the Court was as follows :

This appeal arises out of an application under the Succession Certificate Act VII of 1889 for a certificate to collect the debts due to the estate of one Ishan Chandra Mitter. The petitioners are (1) the daughter of the sister of the deceased, and (2) the son of that daughter. The Secretary of State opposed the petition on the ground that under the Dayabhaga School of Hindu Law, by which the deceased Ishan Chandra Mitter was governed, the petitioners are not heirs at all. The brother of the wife of the deceased raised a similar objection. He raised another objection also, to which, however, it is not necessary to refer.

The District Judge has rejected the application on the ground that under the Dayabhaga Law, the petitioners are not heirs, as they offer no funeral oblations to the ancestors of the deceased.

The petitioners have appealed. We agree with the learned District Judge in his conclusion. It is unquestionable that under the Dayabhaga, sister is not an heir. The father's daughter's son, *i.e.*, the sister's son is, by the author of the Dayabhaga, declared to be an heir on account of his competency to offer oblations to the father of the deceased, in which oblations the latter participates (see Dayabhaga, Chapter XI, section 6, paragraph 9). The claim of the daughter of the sister who offers no such oblations cannot be placed upon a higher footing than that of the sister herself and indeed such a claim has not been advanced before us at all.

But it has been contended that as the sister's daughter's son has been held in the case of *Umaid Bahadur v. Udoi Chand* (1) to be an heir under the Mitakshara, he ought similarly to be held to be an heir under the Dayabhaga Law, because as has been further argued, wherever the Dayabhaga is silent *the law is to be taken from the Mitakshara, and in support of this latter contention reliance has been placed upon some observations of the

(1) (1880) I. L. R. 6 Calc. 119.

* [See *Akhoy Chandra v. Hasi Dass* 12 C. W. N. 511 at 514—Rep.]

Privy Council in the case of the *Collector of Madura v. Moottoo Ramalinga Sathupathy* (1) and that of *Moniram Kolita v. Kerry Kollitani* (2).

We do not think that the passages cited bear out the broad proposition formulated before us nor have they any reference to any question of inheritance.

A sister's daughter's son has been held to be an heir under the Mitakshara law on the ground of community of corporal particles between him and the *propositus*. But if competency to offer funeral oblations is, as indeed it has been declared by the author of the Dayabhaga, the principal ground for the succession of the father's daughter's son, *i.e.* the sister's son, we fail to see how the son of the daughter of the sister can claim inclusion in the category of heirs upon any other ground. It is conceded that he does not offer any oblations to the ancestors of the *propositus* under the Dayabhaga law, a sister's son succeeds before the grandfather, and it is somewhat strange that her daughter's son should be postponed till after all the Samanodakas that is, after all the ascendants and the descendants up to the fourteenth generation, have been exhausted and indeed no nearer position has been claimed on his behalf. No such anomaly arises under the Mitakshara, because under that law, both the sister's son and the sister's daughter's son came in after the Samanodakas.

We are of opinion, therefore, that *prima facie* a sister's daughter's son is not an heir under the Dayabhaga law. Moreover, the entire absence of any decided case directly in point, affirming the right now set up on behalf of the sister's daughter and sister's daughter's son, despite the fact that they are such near relations, is very significant and tells strongly against the validity of such a claim.

Having regard to the summary character of the present proceedings, we refrain from expressing a final opinion on the question. All that we need say at present is that we are not satisfied by the arguments that have been advanced before us that they are heirs under the Dayabhaga law. They are, therefore, not entitled to the certificate they have asked for.

For these reasons, the appeal must be dismissed with costs, 4 gold mohurs payable to the Secretary of State, and 1 gold mohur to Bhagabat Chunder Ghose.

A. T. M.

Appeal dismissed.

(1) (1868) 12 M. I. A. 397.

(2) (1879) L. R. 7 I. A. 115.

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Krishna Pada Dutt
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Secretary of State
for India in Council.

*Before Sir Francis W. Maclean, K. C. I. E., Chief Justice
and Mr. Justice Doss.*

NARENDRA KUMAR PRAMANICK AND OTHERS.

v.

CHARU CHUNDER PRAMANICK.*

*Probate and Administration Act (V of 1881), Sec. 41—Application
by executor's son—Discretion.*

A testator bequeathed by will, the whole of his property to an idol and appointed his wives and son executrices and executor, who, however, did not take out any probate, but the son mortgaged the property. After the property was sold in execution of a decree on the mortgage, the testator's grandsons under the guardianship of their mother applied for probate of the will:

Held, they being not executors were not entitled to probate, and the case was not a fit one for grant of probate under section 41 of the Probate and Administration Act, the mother being a pardanashin lady, the father, the defaulting executor would manage the whole business.

Appeal by the Petitioners.

Application for Probate of a will.

The facts of the case appear sufficiently from the judgment.

Babus Nil Madhub Bose and Sarat Chandra Khan for the Appellant.

Mr. Caspersz and Babus Ram Chandra Mojumdar and Brojo Lal Chuckerbutty for the Respondent.

The judgment of the Court were as follows :

Maclean C. J.—This is an application for probate, and it is of a somewhat novel nature. One Kally Prosanna Pramanik made his will so far back as the 12th of March 1889. He devoted, in substance, the whole of his property to an idol, and appointed his elder wife, his younger wife and his adopted son Hiranmoy, *shebais*, executrices and executor of the will. The will provided for the continuance of *shebais* in the sons, grandsons and other heirs in succession. The executrices and executor never applied for probate, and no probate has been taken out. It has been found that the adopted son Hiranmoy, suppressing the will has dealt with the property as if there had been no will. He appears to have mortgaged it : a suit was instituted to realize that mortgage ; the property was sold, and the purchaser appears on the present occasion to resist this application. Neither the executrices nor the executor have appeared though they had been cited. In these circumstances the present application is made. It is made

* Appeal from Original Decree No. 236 of 1906, against the decree of F. MacBlaine Esq., District Judge of Nadia, dated the 14th March 1906.

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by the two minor children of the executor Hironmoy, and is made by their mother as their next friend, on the ground that neither the executrices nor the executor have taken out probate, and that the estate has been maladministered. It is quite clear that probate cannot be granted to them, because they are not the executors of the will.

Then it is urged that the Court may act under section 41 of the Indian Probate and Administration Act : and, had the circumstances been different we might have taken that course. But we do not think this is a *bonafide* application : it strikes us as one instigated and set on foot by the executor, the adopted son, who is now putting up his minor sons through their mother to obtain Letters of Administration with the will annexed and so set up the will and say that the property was *debutter*, and consequently, the subsequent dealings with it by way of mortgage and sale were bad. The Court below has found, and so far as one can see, properly, that there is no question as to the will. It is easy to see, if this application be granted, who would pull the strings. The mother, the next friend, is a *pardanashin* woman, and the husband the alleged defaulting executor would manage the whole business. In these circumstances, we decline to exercise the discretionary power vested in us under section 41. At the same time it is a case, in which if an application were made for the appointment of a thoroughly independent person to protect the estate as the executrices and executor have declined to act, it would probably be successful, and our order is not to prejudice any such application being made. The appeal must be dismissed with costs, hearing fee, seven gold mohurs payable to the respondent Charu Chandra Pramanick.

Doss J.—I agree.

A. T. M.

Appeal dismissed.

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Narendra Kumar
Pramanick

v.
Charu Chunder
Pramanick.

Maclean, C. J.

Before Mr. Justice Stephen and Mr. Justice Doss.

RAGHU NATH BHAGAT AND OTHERS

v.

SYED SAMAD SHAH AND OTHERS.*

CIVIL,

1908.

January, 23,

Chota Nagpore Landlord and Tenant Procedure Act (I of 1879 B. C.), Sec. 37—Suit to recover tenure—Denial of tenant's title by landlord—Limitation Act (XV of 1877), Sec. 14, Sch. II, Arts. 138, 142—Exclusion of time—Non-mention of claim to extension in the plaint, not fatal.

A suit to recover a permanent tenure by the auction-purchaser from tenant in which the landlord defendant denies the title of the plaintiff on the ground that on the death of the previous tenant the land reverted to him does not come under section 37 of the Chota Nagpore Landlord and Tenant Procedure Act and is triable by the Civil Court. To such a suit Art. 142 and not Art. 138 of Schedule II of the Limitation Act is applicable.

In computing the period of limitation, the time during which a suit remained pending in a Court not having jurisdiction to entertain it is to be excluded under section 14 of the Limitation Act. The non-mention of a claim to that extension of the period in the plaint, presented to the proper Court after return, is not fatal.

Jogeshwar Roy v. Raj Narain Mitter (1) distinguished.

Appeal by the Defendants.

Suit to recover possession of a permanent tenure.

The facts of the case as given in the judgment of the lower appellate Court are as follows :

"Three kharis of land in village Karra were the *bhuinhari* land of one Karma Pahan. The appellants are the *maliks mocurari-dars* of the village and in execution of a rent-decree against Karma Pahan sold up this tenure or holding on 17th March, 1892, the sale being confirmed on 20th May, 1892, and that on 22nd July, 1892, possession was taken by the purchaser one Yar Ali Khan, who then settled the lands with Jadu Pahan, on 24th March, 1893, Yar Ali sold his rights to Hingan Khan who sued Jadu Pahan for rent and that his suit was dismissed on 11th July, 1894. Hingan again transferred his right to the plaintiff in September 1897, or the 21st September to be accurate, and the plaintiff now sues to recover possession after declaration of his title."

The defendants 1 to 3 raised following objections:—

(1) the Court has no jurisdiction to try the suit ; (2) the suit is

* Appeal from Appellate Decree No. 565 of 1906, against the decree of W. H. Vincent, Esq. Judicial Commissioner of Chota Nagpore, dated the 6th December 1906, confirming that of Babu Lal Gopal Sen, Subordinate Judge of Ranchi, dated the 20th June 1906.

(1) (1903) I. L. R. 31 Calc. 195.

barred by the general and the special Law of Limitation and (3) the defendants have acquired right to the land by adverse possession.

The Court below decreed the suit.

Babus Digambar Chatterjee (for Babu Joges Chunder Roy) and Akhoy Kumar Banerji for the Appellants.

Moulvi Mahammed Yusuf and Mr. G. Sircar for the Respondents.

The judgment of the Court was as follows :

In this case the plaintiff by reason of a transfer of the interest acquired at an auction purchase claims to be the tenant of the defendant and seeks to have his rights declared and for khas possession of the land in question. The suit was decreed in the first Court and the appeal before the lower appellate Court was dismissed.

The points that have been made before us are, in the first place, that this case is not one which can properly be tried before the Civil Court, that it is a possessory suit, and by reason of section 37 of Act I (B. C.) of 1879 is maintainable only before the Deputy Commissioner. This is a contention which does not meet with our approval. The question is whether or not this can be considered only as a possessory suit, and substantially the suit is to recover a permanent tenure in which the landlord denies the title of the plaintiff on the ground that on the death of the previous tenant the land reverted to himself. Here is a dispute going to the root of the plaintiff's title which seems to us to be plainly a case proper for the jurisdiction of the Civil Court. We, therefore, hold that section 37 has no application. And from that it follows that contrary to the defendants' contention, the special limitation provided in the Chota Nagpur Landlord and Tenant Procedure Act has no application.

We then come to the second question which is whether the present suit is barred by general limitation. There is in the judgment of the lower Court, what may be taken to be a finding that the plaintiff's predecessor in title was in possession of the land for one year after the 22nd July, 1892, and this suit having been brought on the 22nd July, 1904, this would bring it within any period of limitation which can apply to it. It may, however, be open to doubt whether the passage I have referred to has in fact the effect of a definite finding of fact, and we are pressed by the consideration that it is not on the fact which seems to be so indicated that the learned Judge has based his

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judgment. It, therefore, becomes necessary to consider the cogency of the other grounds which we find in the judgment.

The essential feature of the case is that the auction sale of the property claimed by the plaintiff occurred on the 7th March, 1892, and that the auction purchaser was put into possession of that property on the 22nd July in the same year. Now the Article, which the appellant suggests, is applicable to this case is Article 138, *i.e.* where there is a suit by a purchaser of land at a sale in execution of a decree for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale. This is to be contrasted with Article 142, and in our opinion the Judge is right in considering that the case falls under the latter rather than under the former Article. Article 188 refers more to questions between the auction-purchaser and the tenant, but the present case seems to fall under the more general scope of Article 142. There may be a question as to how far the case* referred to by the learned Judge applies to this case, but the facts of that case may be distinguished on the ground of the different relations of the parties to one another. The learned Judge has held that this suit having been instituted before the Munsiff within the period of limitation, is in time. When the suit came before the Munsiff he found, that he had no jurisdiction to entertain it and accordingly, returned the papers which were subsequently, filed with the Subordinate Judge. We consider that the Judge has rightly added the delay so caused to the period of limitation under section 14 of the Limitation Act, and that it would be putting too strict a meaning on section 14 of the Act taken with section 50, Civil Procedure Code, to hold that because no claim to that extension of the period in which to bring the action was made in the plaint, therefore, the case must fail. We have been referred to the case of *Jogeshwar Roy v. Raj Narain Mitter* (1), where it is decided that the omission to claim any such extension in the plaint is a fatal bar to the claim. But looking at the facts of that case they seem to be sufficiently different from those of the present case as not to be applicable.

The result is, that this appeal must be dismissed with costs.

A. T. M.

Appeal dismissed.

*[*Jogobundhu Mitter v. Purnanunda Gossami* (1889) I.L.R. 16 Calc. 530.]

(1) (1903) I. L. R. 31 Calc. 195.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

BALESWAR BAGARTI

v.

BHAGIRATHI DASS AND ANOTHER.*

CIVIL.

1908.

January, 21.

April, 7.

Governor-General's authority to place territory within jurisdiction of High Court—Sambalpur, High Court's jurisdiction over—Decree, not inter parties, evidence—Decree, not giving relief against party, when binding against him—Statute, interpretation of—Statute 28 and 29 Vict. c. 15, Sec. 3—Indian High Court's Act, 1861 (24 and 25 Vict. c. 104)—Repealed Act, Court's power to look at, in construing.

The Governor-General in Council has authority, not only to transfer any territory from the jurisdiction of one High Court to that of another, but also to place within the jurisdiction of any High Court, entirely or partially, territory not originally included therein, even though in the latter event, such place was not part of the Presidency, place or places for which the High Court had already been established.

Although a decree may not be binding upon a defendant, it is admissible in evidence as against him, as an instance of a litigation in which the right in controversy was successfully asserted by the predecessor of the plaintiffs against a member of the family to which the defendant belonged.

Ram Ranjan v. Ram Narayan (1), *Bitto v. Kesho* (2) and *Dinomoni v. Brojo Mohini* (3) referred to.

A decree made against a party in a previous suit in which the genuineness of a mortgage was established in his presence, but no relief was awarded as against him, because it was alleged that he had no interest in the equity of redemption, is binding on him in subsequent suits when he seeks to make out that it was he who was interested in the property and not the mortgagor.

Nilkant v. Suresh Chandra (4) and *Bhaya Chowdhury v. Chunilal* (5) referred to.

Per Mookerjee J.—Although a repealed Statute has to be considered as if it had never existed, this does not prevent the Court from looking at a Repealed Act in *pari materia* on a question of construction; when the provisions of a Statute, as to the scope of which there is room for reasonable doubt, have to be construed, reference may legitimately be made to the previous history of the law on the subject. But it is only when the Statute or its phraseology is ambiguous and such as to admit of two meanings that a historical investigation of this kind is permissible.

Ex parte Copeland (6), *United States v. Chase* (7) and *Queen v. Most* (8) referred to.

* Appeal from Appellate Decree No. 1375 of 1907 and Civil Rule No. 2812 of 1907, against the decree of Babu Purna Chandra Mitra, District Judge of Sambalpur, dated the 24th June, 1907, affirming that of Babu S. K. Ghose, Subordinate Judge of Sambalpur, dated the 17th September, 1906.

(1) (1894) L. L. R. 22 Calc. 533; L. R. 22 I. A. 60.

(2) (1896) L. R. 24. I. A. 10.

(3) (1901) L. L. R. 29 Calc. 187; L. R. 29 I. A. 24.

(4) (1885) L. L. R. 12 Calc. 414 (423).

(5) (1906) 5 C. L. J. 95 (105).

(6) (1852) 2 DeG. M. & G. 914; 42 E. R. 1129.

(7) (1889) 135 U. S. 261.

(8) (1881) 7 Q. B. D. 244.

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Appeal by the Defendant.

Suit for recovery of possession of a mouzah.

The facts and arguments appear sufficiently from the judgments.

Babus Satis Chandra Ghose and Anilendra Nath Roy Chowdhuri for the Appellant.

Dr. Rash Behary Ghose and Mr. G. Sircar for the Respondents.

C. A. V.

The judgments of the Court were as follows :

Stephen J.—This case comes before us in second appeal from a judgment of the Subordinate Judge of Sambalpur, and a preliminary objection is raised that we have no jurisdiction to deal with it, because the Governor-General in Council acted *ultra vires* in purporting to extend the jurisdiction of this Court over Sambalpur which was till the date of the order hereafter mentioned a district in the Central Provinces.

The matter stands thus. The Statute 28 and 29 Vict. c. 15 section 3 enacts that "it shall be lawful for the Governor-General of India in Council by order from time to time to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established or to be established under the said Act *i.e.* (The Indian High Court's Act 1861) and to authorize and empower any High Court to exercise all or any portion of the jurisdiction and powers conferred or to be conferred on it by Her Majesty's Letters Patent establishing the same, or any other Letters Patent issued by Her Majesty under the provisions of the Indian High Court's Act, 1861, within any such portions of Her Majesty's dominions in India, not included within the limits of the Presidency or place or places for which such High Court was established as the Governor-General in Council may from time to time determine ...

... .” The Statute 28 and 29 Vict. c. 17 section 4.1
“It shall be lawful for the Governor-General of India in Council from time to time to declare and appoint by proclamation that part or parts of the Indian territories for the time being under the dominion of Her Majesty shall be or continue subject to each of the Presidencies and Lieutenant Governorships for the time being subsisting in such territories and to make such distribution and arrangement or new distribution and arrangement of such territories into or among such Presidencies and Lieutenant-Governorships as to the said Governor-General in Council may seem expedient.”

On the 1st. September, 1905, the Governor-General in Council made a proclamation No. 2833 published in the India Gazette on 2nd. September, 1905, p. 636 by which he transferred Sambalpur to Bengal under 28 and 29 Vict. c. 17. On the same day by a notification No. 1363 published in the same Gazette, p. 637 acting under the above-mentioned section of 28 and 29 Vict. c. 15 he authorized and empowered this Court to exercise "within that portion of His Majesty's dominions in India which is comprised within the limits of the Sambulpur district" (excepting two named zemindaries) "and is not included within the limits of the places for which the said High Court was established all such jurisdiction and powers as the said High Court may from time to time exercise within the limits of the places for which the said High Court was established."

No objection is taken to this proclamation and notification but what is said is that the portion of section 3 of the 28 and 29 Vict. c. 15 that I have quoted is to be taken as one enactment, that the first part gives the Governor-General in Council power to transfer a place from the jurisdiction of one High Court to that of another, and the rest of the enactment does nothing more than provide means by which jurisdiction may be conferred on the transferee Court when such a transfer is made. Apart from the conclusions to be drawn from the contents of a repealed enactment that I will refer to afterwards, and apart from authority that is, looking merely at the language of section itself, I am quite unable to see how this can be so. The first part of the section relating to the transfer of a place from the jurisdiction of one High Court to that of another is complete in itself; and if the Governor-General in Council can transfer a place to the jurisdiction of the High Court, no more power can be needed to give that Court jurisdiction. This may be seen by a reference to the Bengal, North-Western Provinces and Assam Civil Court's Act 1887 (Act 17 of 1887 B. C.) section 3 where power is given to the Local Government "to fix and alter the local limits of the jurisdiction of any Civil Courts" and no other provision exists enabling the Local Government to give jurisdiction to the transferee Court. Also I cannot see that there is anything in the second part of the section referring to the first part. It confers powers on any High Court, not specifically one of the High Courts to which the first part of the section refers in any given case, and it gives the Courts referred to jurisdiction over any portions of Her Majesty's dominions in India with limitations which also contain

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no specific reference to what goes before. I am strengthened in this view by the fact that the section concludes with a provision for extending the jurisdiction of a High Court over Christian subjects of Her Majesty in Native States, which is plainly a wholly separate provision from what precedes it. My opinion on the meaning of the section as it stands, therefore, decidedly is that it deals with three distinct matters : (a) a transfer of a place from the jurisdiction of one High Court to that of another ; (b) the extension of the jurisdiction of a High Court to a place not originally within jurisdiction of a High Court ; (c) the extension of the jurisdiction of a High Court to Christian subjects of Her Majesty in Native States. And if the section is so read the only way in which (b) can be considered complementary to (a) is that it provides for cases not included in (a), and it is impossible that it should merely provide machinery for carrying out the provisions of (a).

It was sought to found an agreement to the contrary effect on the provisions of the Indian High Court's Act 1861 (24 and 25 Vict. c. 104) section 18 repealed by the Act of 1865. This section gave the Crown power to transfer a place from the jurisdiction of one to that of another High Court and generally to alter and determine the territorial limits of the jurisdiction of the said several High Courts. The chief purpose of the Act of 1865 was to transfer the powers of the Crown to the Governor-General in Council : and it is argued that the repealed section gave the Crown no power to extend the jurisdiction of a High Court to a place not already within the jurisdiction of such a Court, and that section 3 of the Repealing Act is substantially a re-enactment of the repealed section, substituting the new for the old authority, but giving no wider powers to the Governor-General in Council than were before given to the Crown.

I cannot assent to the effect so attributed to the repealed section 18 of the Act of 1861. The Crown could alter the territorial limits of the jurisdiction of this Court, and from the terms of the section this must be taken to have been something different from a transfer of a place from the jurisdiction of one to that of another High Court. It seems to me, therefore, probable that the Crown could extend the jurisdiction of a High Court to a place not within such a jurisdiction. And if this is so I see no reason for supposing that the legislature in passing the later Act intended to withhold from the Governor-

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General in Council any powers in respect of the present matter that were exercised by the Crown. But it is not necessary to decide this point as the terms of section 3 of the Act of 1865 are far fuller than those of section 18 of the Act of 1861, and if the earlier section did not give the power in question to the Crown it still seems to me certain that the later section is in terms not a mere re-enactment of the repealed section, but did give such a power to the Governor-General in Council. This is consistent with the repealed preamble of the Act of 1865, which recites the expediency of making "further provision than is in the said Act (*i.e.* the Act of 1861) contained for empowering the alteration, from time to time, of the local limits of the said High Courts, and for the exercise, in places beyond the limits of the Presidencies or places within and for which such High Courts are established, of a jurisdiction and powers conferred by Her Most Excellent Majesty's Letters Patent on the said High Courts. The effect of the repealed section thus seems to me to favour the view of the later section that I have suggested.

There then remains to be considered what is perhaps the strongest point made by the appellant. This is a note by Sir Courteney Ilbert in his *Government of India*, 2nd edition p. 247, where after referring to the present section he says: "It would seem that section 3 of the Act of 1865 ... only empowered the Governor-General to make an order transferring any territory from the jurisdiction of one Court to the jurisdiction of another, and that the second branch of the section was only to enable the Governor-General to authorize the Court to which such transfer was made to exercise jurisdiction." He then suggests that the Governor-General in Council could not extend the local and personal jurisdiction of the High Court at Allahabad over the province of Oudh a supposition which seems to be an all fours with this case. For the reasons, I have given, I cannot agree with this suggestion, high though its authority is. I dissent from it with the less hesitation because I find that I am supported by the authority of Sir Henry Maine who in a Minute written on the 29th May 1866 (Minutes by Sir Henry Maine, 1862-1869 No. 45) seems to express exactly a contrary opinion to that of Sir Courteney Ilbert. The construction of section 3 is apparently not immediately relevant to the point discussed in the Minute; but, in describing the effect of that section, the writer divides it into three paragraphs,

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marked by (a), (b) and (c) respectively, an arrangement I have copied above. He then proceeds: "under clause (a) the plainest case is an actual transfer of territory, as for example, the transfer of Behar to the jurisdiction of the High Court of the North-West. Under clause (b) the western part of the Central Provinces might be wholly brought within the jurisdiction of the High Court of Bombay," a suppositious case which resembles that put by Sir Courteney Ilbert only in being on all fours with the present. This difference between two of the highest possible non-judicial authorities at least leaves me free to follow my own opinion as stated above.

In conclusion, I have only to add that it seems that the Governor-General has at least twice acted on the assumption that he has the power that is now called in question as will be seen on a reference to notification No. 1203 dated the 23rd September, 1874, and published in the *India Gazette* of 26th September, 1874, giving the High Court of Allahabad jurisdiction over a part of the East India Railway and its appurtenances that lie partly in Central India and partly in the Central Provinces; and to notification No. 305, dated the 18th February, 1901, and published in the *India Gazette* of the 23rd February, 1901, giving this Court jurisdiction in parts of Sibsagar in Assam.

I, therefore, hold that the notification of the Secretary of State giving this Court jurisdiction over Sambalpur was not *ultra vires*, that this Court can, therefore, exercise the same jurisdiction over Sambalpur that it can exercise over the rest of Bengal, and that we, therefore, have jurisdiction to hear this appeal.

On the merits of the case, the plaintiff sues for recovery of possession of a certain mouzah on the strength of a foreclosed mortgage granted by one Mussamat Bharno. It is found that the plaintiff obtained a foreclosure decree in respect of the mortgage in a suit in which the defendant was a party. But it was suggested in the first place that it had not been proved that Bharno was sole owner of the mouzah. The lower appellate Court held that she was such owner because Bharno had sued Satyabadi, the defendant's deceased brother, and it was found that Bharno was the owner of the entire village. To that suit the defendant was not made a party being a minor, but it was said that Satyabadi was then joint with him, and the lower appellate Court accordingly held that the defendant was bound

by the decree. This finding may in terms be open to objection in the circumstances of the case, but the suit at least shows an assertion of title by Bhamo, and the Judge holds that a *khewat* of a settlement and copies of certain *chowalas* clearly prove that Bhamo was the sole owner of the village. Under these circumstances the findings of fact in the Court below are too strong for the defendant to succeed on this point.

It is further argued that the foreclosure decree is not binding on the defendant, but he was a party to the suit and the validity of the mortgage was determined in his presence, though no decree was made against him on the ground that he had no interest in the property. Under the present circumstances, it is impossible to hold that he is not bound by the decree.

The result is that this appeal is dismissed with costs.

A Rule was issued in this case on the plaintiff to show cause why the delivery of possession should not be stayed pending the hearing of this appeal on certain terms, and pending the hearing of the Rule, delivery of possession was stayed. This Rule is now discharged.

Mookerjee J.—This is an appeal from a decision of the District Judge of Sambalpur in an action for recovery of possession of land commenced by the plaintiffs respondents in the Court of the Subordinate Judge of Sambalpur. A decree has been made in favour of the plaintiffs by both the Courts below, the validity of which is questioned on behalf of the defendant, substantially, on the ground that the District Judge has misunderstood the legal effect of the decrees in two previous litigations. A preliminary objection is taken to the hearing of the appeal on behalf of the respondents. It is argued that the District of Sambalpur is outside the territorial limits of the jurisdiction of this Court, inasmuch as proclamation No. 2833 issued by the Governor-General in Council on the 1st of September, 1905, which declared and appointed that the District of Sambalpur shall cease to form part of the Central Provinces and shall be subject to and included within the limits of the Bengal Division of the Presidency of Fort William, is *ultra vires* (Gazette of India, 2nd September, 1905, part I, page 636). The question raised is one of some novelty and of considerable importance and requires careful consideration; as it goes to the root of our jurisdiction, it must be decided before we can take cognizance of the appeal.

It is argued by the learned vakil for the respondents that

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the Governor-General in Council had no authority under Statute 28 and 29, Vict. Ch. 15, to issue this proclamation so as to transfer a portion of the territory originally comprised within the jurisdiction of the Court of the Judicial Commissioner of the Central Provinces and place it within the jurisdiction of the High Court, and in support of this position, reliance is placed upon a passage from a treatise on the Government of India by Sir Courteney Ilbert (First Edition, 250, second Edition 246). The validity of this contention must be tested primarily by reference to the language of the statute to which I have just referred.

The preamble to Statutes 28 and 29, Vict. Ch. 15, explains among other things that the object of the statute was to make further provision than is contained in the Indian High Court's Act of 1861, (Statutes 24 and 25, Vict. c. 104), empowering the alteration from time to time of the local limits of the High Courts and for the exercise, in places beyond the limits of the Presidencies, places within and for which such High Courts are established, of jurisdictional powers conferred by Her Majesty's Letters Patent on the High Courts. Section 2 of the Statute next repeals sections 10 and 18 of the High Court's Act, the former of which provided that the High Courts were to exercise the same jurisdiction as the Supreme Courts, and the latter provided that the territorial limits of the jurisdiction of a High Court might be altered by an order in Council. Section 3 of the Statute then authorizes the Governor-General in Council to alter the local limits of the jurisdiction of the High Courts. It provides that it shall be lawful for the Governor-General in Council, *first*, to transfer any territory or place from the jurisdiction of any other of the High Courts established or to be established under the High Court's Act, *secondly*, to authorize and empower any High Court to exercise all or any portion of the jurisdiction and powers conferred or to be conferred on it by Her Majesty's Letters Patent within any such portions of Her Majesty's dominions not included within the limits of the Presidency, place or places for which such High Court was established, as the Governor-General in Council may from time to time determine, and *thirdly*, to exercise any such jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of such of the Princes and States of India in alliance with Her Majesty as the Governor-General in Council may from time to time determine. The plain reading of the

third section of the statute seems to me to be that it consists of three independent clauses. We were invited, however, by the learned vakil for the respondents to treat the first of these clauses alone as embracing the essence of the section and the remainder as merely consequential. In my opinion, there is no foundation whatever for this argument. The first clause clearly contemplates the transfer of any territory comprised within the jurisdiction of one High Court to the jurisdiction of any other High Court. As soon as such a transfer has been effected by an appropriate order made in terms of the section, the transfer would be operative in the sense that the High Court, within the jurisdiction of which the new territory has been brought, would have power and authority to exercise jurisdiction thereover. It would be entirely superfluous to add a second clause for this purpose. In fact, upon a close examination of the second clause, it is obvious that it is in no sense subordinate or subservient to the first clause, and that its scope is entirely different. The second clause enables the Governor-General in Council by an appropriate order to bring within the jurisdiction of any High Court entirely or partially, a territory not originally comprised therein, because such territory is not included within the limits of the Presidency place or places for which the High Court has already been established. Clearly, by no stretch of language can this be regarded as a provision consequential to that contained in the first clause. This view is considerably strengthened if we examine for a moment the scope of the third clause, which empowers the Governor-General in Council to authorize a High Court to exercise its jurisdiction in respect of Christian subjects of Her Majesty resident within the dominions of allied Princes and States. Surely, this clause can in no event be treated as consequential to the first clause. It may well be asked then, what is the foundation for the suggestion that the second clause is not independent of the first, but merely subordinate to it? Upon an examination then of all the provisions of the third section of the Statute, there does not appear to be any room for reasonable doubt that the Governor-General in Council has authority, not only to transfer any territory from the jurisdiction of one High Court to that of another, but also to place within the jurisdiction of any High Court, entirely or partially, territory not originally included therein, even though in the latter event such place was not part of the Presidency place or places for which the High Court had already been established. I am fortified

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in this view of the object and scope of section 3, by an examination of the repealed provisions of the Indian High Court's Act of 1861. I may point out that this mode of interpretation is perfectly legitimate and is supported by high authority : *Heydon's Case* (1). It is well settled that, although a repealed statute has to be considered as if it had never existed, this does not prevent the Court from looking at a repealed Act in *pari materia* on a question of construction : *Exp. Copeland* (2), nor can it be disputed that when the provisions of a statute, as to the scope of which there is room for reasonable doubt, have to be construed, reference may legitimately be made to the previous history of the law on the subject, as was done by the Judicial Committee in *Ishuree Persad v. Lal Chutterput* (3) and *James Brown v. Mclachlan* (4). I am not unmindful that it is only when the statute or its phraseology is ambiguous and such as to admit of two meanings that a historical investigation of this kind is permissible : *Queen v. Most* (5), *United States v. Chase* (6) and, that, in any case, as observed by Lord Watson in *Bradlaugh v. Clarke* (7), it is an extremely hazardous proceeding to refer to provisions, which have been absolutely repealed, in order to ascertain what the Legislature intended to enact in their room and stead. With these observations in view, if we turn for a moment to the provisions of sections 10 and 18 of the Indian High Court's Act of 1861, what is the position? Section 10 defined the jurisdiction of the High Courts to be identical with that of the Supreme Courts. Section 18 then provided that it shall be lawful for Her Majesty from time to time, by order in Council, to transfer any territory or place from the jurisdiction of one to the jurisdiction of any other of the High Courts established under the Act, and, generally to alter and determine the territorial limits of the jurisdiction of the said several Courts, as to Her Majesty with the advice of Her Privy Council may seem meet. The reasonable construction of this provision of the law seems to me to be that the territorial limits of the jurisdiction of any High Court might be altered by an order in Council. What then was the object which the Legislature had in view, when section 18 was replaced by sections 3 and 4 of statutes 28 and 29, Vict. Ch : 15? There is nothing to indicate that the intention of the Legislature was to

(1) 3 Coke 7a.

(2) 2 DeG. M. & G. 914.

(3) (1842) 3 Moor's I. A. 100 (130).

(4) (1872) L. R. 4 P. C. 543 (550).

(5) (1881) 7 Q. B. D. 244.

(6) (1889) 135 U. S. 261.

(7) (1883) 8 App. Cas. 354 (380).

restrict the exercise of the power of alteration of territorial limits of the jurisdiction of High Courts, only to cases of transfer of territory from one High Court to another. The intention, on the other hand, seems to have been of an entirely different character, *namely*, to make an alteration of jurisdiction possible without the previous sanction of the Crown. Under section 18 of the statute of 1861, the authority was vested in the Crown alone. Under the statute of 1865, the authority is vested in the Governor-General in Council, subject to the authority of the Crown to disallow any order made by the Governor-General in this behalf. If we accede to the contention of the respondents, the result would be that neither the Governor-General nor the Crown would have any authority to alter the jurisdiction of any High Court by inclusion of territory not comprised within the jurisdiction of a High Court. Such intention is undoubtedly not manifested by the language of section 3 of the statute of 1865, and in the absence of clear indication to the contrary, I would hesitate to support the inference that the object and effect of the statute of 1865 was to deprive the Crown of the authority which it possessed under the statute of 1861. I have not been able by an examination of the history of the working of the statute of 1861 or of the history of the legislation of 1865 to lay any solid basis for the theory that mischief had resulted, because the Crown possessed practically unlimited powers of alteration of territorial limits of jurisdiction of High Courts and that it became consequently necessary to restrict those powers. I have tried to place myself in the place of the Legislature at the time of the enactment of the statute of 1865, and I have not been able to ascertain any historical facts which would justify me in the conclusion that the object of the legislation of 1865 was to restrict the authority of the Crown : *People v. Supervisors* (1), *United States v. Union* (2). It follows consequently, that an examination of the language of the repealed sections of the statute of 1861 confirms the interpretation at which we arrive on an examination of the plain language of section 3 of the statute of 1865. Some stress must also be laid upon the circumstance that the construction, which I place upon the section, has hitherto been accepted as the true interpretation of the section, which has been on at least two occasions similarly interpreted and applied by the Governor-General in Council. It is a well-settled principle of interpretation that Courts in construing a statute will

(1) (1871) 43 N. Y. 130.

(2) (1875) 91 U. S. 72.

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give much weight to the interpretation put upon it at the time of its enactment and since, by those whose duty it has been to construe, execute and apply it. I do not suggest for a moment that such interpretation has by any means controlling effect upon the Courts [*Stuart v. Laird* (1), *United States v. Dixon* (2)], such interpretation may, if occasion arises, have to be disregarded for cogent and persuasive reasons and in a clear case of error, a Court would without hesitation refuse to follow such construction. [*Dame Evanturel v. Evanturel* (3), *United States v. Tanner* (4), *Greely v. Thompson* (5)]. In the present case, however, the language of section 3 of the statute, whether interpreted by itself, or in the light of the provisions of the repealed sections of the statute of 1861, or in view of the construction which has been placed upon it for a long series of years, does not lend any support to the contention of the respondents.

Much reliance was placed on behalf of the respondents upon the opinion of Sir Courteney Ilbert, who observes in section 104 of his treatise on the Government of India that section 3 of the statute of 1865 only empowers the Governor-General in Council to make an order transferring any territory from the jurisdiction of one Court to the jurisdiction of another, and that the effect of the second branch of the section is only to enable the Governor-General to authorize the Court to which such transfer has been made, to exercise its jurisdiction. With all deference to the opinion of so learned an author, I am unable in the present instance to adopt it as well founded, and I observe that Sir Courteney Ilbert puts forward his view with some apparent hesitation. On the other hand, it must not be overlooked that the authority of Sir Henry Maine is directly opposed to the view indicated by Sir Courteney Ilbert. Sir Henry Maine points out that the statute of 1865 must be interpreted by reference to the two sections of the statute of 1861 which it repeals, and observes that it was plainly intended to enable the Governor-General in Council, subject to the veto of the Secretary of State, to do certain things by notification, which under the repealed sections could only be done by the Crown. After reference to sections 10 and 18 of the statute of 1861, he next proceeds to analyse section 3 of the statute of 1865 as follows : "Section 3 empowers the Governor-General in Council

(a) to transfer any territory or place from the jurisdiction of one to the jurisdiction of another High Court ;

(1) (1806) 1 Cranch 299.

(3) (1869) L. R. 2 P. C. 462.

(2) (1841) 15 Peter 161,

(4) (1892) 147 U. S. 661.

(5) (1850) 10 Howard 225.

(b) to authorize any High Court to exercise all or any portion of its jurisdiction and powers within any such portions of Her Majesty's Dominions in India not included within the Presidency or place for which such High Court was established, as the Governor-General in Council shall from time to time determine ;

(c) to authorize any High Court, to exercise any such, that is, all or any part of its jurisdiction, in respect of Christian subjects of Her Majesty resident in such Native States, as the Governor-General in Council shall determine.

Under clause (a), the plainest case is an actual transfer of territory, as for example, the transfer of Behar to the jurisdiction of the High Court of the North-West.

Under clause (b), the Western part of the Central Provinces might be wholly brought within the jurisdiction of the High Court of Bombay, or, again, the High Court of Bombay might be empowered to exercise part of its jurisdiction over all or part of the Central Provinces, for example, its jurisdiction over European British subjects criminally charged or such matrimonial or testamentary jurisdiction as it now exercises over European British subjects in the Bombay Presidency beyond the limits of its Ordinary Original Jurisdiction.

Clause (c) is very large. Taking literally, it would allow us to give the High Court Appellate Civil Jurisdiction over Christians in Native States ; but the use of the phrase "Christian subjects" indicates what no doubt, was the real intention, *namely*, that the portion of jurisdiction meant to be exercised was that usually exercised extra-territorially, *i.e.*, matrimonial, testamentary and criminal jurisdictions. (Minutes by Sir Henry Maine, No. 46 pages 82 to 86 of the Edition of 1889, and No. 45, pages 83 to 85 of the Edition of 1892).

It is interesting to observe that one of the hypothetical cases mentioned by Sir Henry Maine is substantially identical with the case now before us, and in view of this exposition of the section from such an eminent jurist as Sir Henry Maine, I feel no doubt that the contention advanced by the respondents is not based on any solid foundation and must be overruled. The appeal therefore, must be considered on the merits.

As regards the merits of the case, the decision of the District Judge is attacked on two grounds, *namely*, *first*, that the decree in a previous litigation to which the present appellant was not a party ought not to have been treated as binding upon him, and

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secondly, that a decree in another litigation to which the appellant was a party, but in which no relief was awarded as against him ought not to have been treated as binding upon him. To test the accuracy of these contentions, it is necessary to explain that the property in dispute is a village which the plaintiffs allege belonged to a lady named Bhamo from whom they claim to have derived title under a foreclosure decree. The defendant, on the other hand, claims title to the property on the basis that it was owned by Samo, the second husband of Bhamo. The question, therefore, to whom the property belonged, ultimately reduces itself to one of fact. The District Judge, however, it is said, has based his conclusion upon the question of title partially on a decree in a previous suit between the brother of the appellant and Bhamo, in which Bhamo successfully asserted her title. That decree is obviously not binding upon the defendant who was not a party to that litigation, nor can it be suggested with any show of reason that his brother was a party to that suit in a representative capacity. If the decision of the District Judge had been based on this decree, it would consequently have been necessary to remand the case. The judgment shows, however, that his conclusion was based upon evidence, independent of this decree, *viz.*, evidence of possession and settlement papers. Under these circumstances, it is unnecessary to remand the case : *Womes Chunder v. Chandee Churn* (1). The present case in fact is in one sense much stronger, because there can be no doubt that, although the decree is not binding upon the defendant, it is admissible in evidence as against him, as an instance of a litigation in which the right now in controversy was successfully asserted by the predecessor of the plaintiffs against a member of the family to which the defendant belonged [*Ramranjan v. Ramnarayan* (2), *Bitto v. Kesho* (3), *Dinomoni v. Brojomohini* (4)]. I must hold, therefore, that the finding of the District Judge upon the question of title to the village cannot be successfully challenged.

The second ground upon which the judgment of the Court below is attacked, is that, the decree in the foreclosure suit obtained by the plaintiffs against Bhamo is not binding upon the defendant. It is to be observed, however, that the defendant was a party to that litigation, the genuineness of the mortgage was established in his presence, but no relief was awarded as

(1) (1881) 1. L. R. 7 Calc. 293.

(3) (1896) 24 I. A. 10.

(2) (1894) 22 I. A. 60.

(4) (1901) 29 I. A. 24.

against him, because it was alleged that he had no interest in the equity of redemption. Under these circumstances, it is difficult to say that the decree is not binding upon him. If he had contended in that litigation that he was interested in the equity of redemption, a liability would have been imposed upon him under the decree. He escaped liability on the ground that he had no interest in the equity of redemption. He now seeks to make out that it was he who was interested in the property and not the mortgagor Bhamo. In this state of facts, it is impossible for him to avoid the effect of the decree, which was passed in his presence against the mortgagor [*Nilkant Banerji v. Suresh Chandra Mullick* (1), *Bhaja Chowdhury v. Chunilal* (2)]. In any event, if the finding upon the question of the title of Bhamo to the village cannot be successfully challenged on this appeal, the foreclosure decree obtained in the presence of the defendant in the mortgage suit is a sufficient foundation for the title of the plaintiffs to entitle them to a decree for ejectment as against the appellants. Neither of the grounds, therefore, upon which the judgment is sought to be assailed can be successfully maintained.

The appeal, consequently, fails and must be dismissed with costs.

The Rule for a stay of proceedings pending appeal is discharged ; but no order is made as to costs.

A. T. M.

Appeal dismissed.

(1) (1885) I. L. R. 12 Cal. 414 (423).

(2) (1906) 5 C. L. J. 95, 106.

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Baleswar Bagarti
v.
Bhagirathi Dass.

Nookerjee, J.

APPELLATE CIVIL.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

CIVIL.

1908.

February, 27.

March, 10.

RAJA SATRUGHAN DEO DHABAL AND ANOTHER
v.

RAJA JAGADISH CHANDRA DEO DHABAL.*

*Chota Nagpore Encumbered Estates Act (VI of 1876, B.C.), Sec. 3 (3) (c),
—Contract by person subsequently declared to be owner of Encumbered
Estate—Subsequent withdrawal of encumbrance—Revival of validity—
Barring of pending suits—‘Debts and liabilities,’ meaning of.*

A contract, entered into by a person who is subsequently declared to be the heir of a deceased person whose estate had been at the time of the contract taken charge of under the Encumbered Estates Act, is void as such person had no competency to contract.

Even though at the time of the execution of the contract he had not been declared to be the heir, yet as soon as he was found to be the heir, he became heir from the time of the devolution of the estate, which was admittedly prior to the execution of the contract and such contract became void for want of capacity to contract.

On the release of the estate from the operation of the Acts, the validity of the contract could not be revived as it was absolutely void.

While the suit was pending the estate was taken charge of for the second time and the suit therefore became barred.

It does not matter, if the particular liability has not been mentioned in the the application under the Act, as ‘debts and liabilities,’ in section 3, mean ‘all debts and liabilities of the holder of the estate taken charge of other than debts or liabilities incurred to Government’.

Kameshar Prasad v. Bhikhan Narain (1), and *Jagadis Chandra Deo Dhabal v. Satrugnan Deo Dhabal* (2) followed.

Appeal by the Defendants.

Suit for specific performance of a contract.

The material facts and arguments appear from the judgment.

Dr. Rash Behary Ghose, Babus Ram Churn Mitter and Jogesh Chandra Roy for the Appellants.

Babu Pravash Chandra Mitter for the Respondent.

C. A. V.

The following judgment was delivered :

These are two appeals in the same case.

They arise out of a suit brought by the plaintiff against the defendant Raja Satrugnan Deo Dhabal to enforce specific

* Appeals from Original Decree No. 85 and 101 of 1906, against the decrees of Babu Srisch Chandra Mukherjee, Sub-Judge of Midnapore, and his successor in office, dated the 14th December, 1905.

(1) (1898) I. L. R. 20 Calc. 609.

(2) (1906) I. L. R. 33 Calc. 1065.

performance of a contract, as well as for compensation for its breach. The estate of the defendant has been taken charge under the Encumbered Estates Act (VI of 1876 B. C.) and the Deputy Commissioner of Singhbhum has been appointed manager of his estate.

Appeal No. 85 of 1906 is against an order of the Subordinate Judge of Midnapore, dated the 14th December 1905, giving the plaintiff a decree in the suit. Appeal No. 101 of 1906 is against an order of the 2nd Subordinate Judge of Midnapore, refusing under section 108, Civil Procedure Code, to set aside the decree of his predecessor of the 14th December 1905, which it was alleged was an *ex parte* decree passed in the absence of the defendant.

The grounds urged in the two appeals are (1) that the Subordinate Judge of Midnapore had no jurisdiction to decree damages against the defendant, who does not reside in the District of Midnapore ; (2) that, at the time of the contract, the defendant was incompetent to enter into any contract, as the estate of the last holder whose heir he is had then been taken charge of under the Chota Nagpore Encumbered Estates Act ; (3) that the defendants' estate has now again been taken under management under the Act, so the suit is barred, and in any case the Deputy Commissioner, the manager of the estate, should have been made a party ; (4) that the whole consideration for the contract did not pass ; and (5) that the defendant should have been given time to defend the suit.

The first of these pleas, we consider, fails, for though the defendant may reside outside the jurisdiction of the Subordinate Judge of Midnapur, the contract was entered into and the cause of action arose within the limits of his jurisdiction.

It would seem to us, however, that the appellant's 2nd and 3rd pleas must prevail. The contract was entered into with the the plaintiff's father on the 7th April 1893, when the defendant was litigating to prove his right as heir to the estate of Ram Chandra Dhal, and when the said estate had been taken charge of under the Encumbered Estates Act. It had been taken charge of in July 1886. It was not released from management till the 27th August 1899. It was again taken charge of under the same Act on the 22nd August 1905, that is, shortly after the institution of this suit, which was brought on the 24th February 1905. The Deputy Commissioner was then appointed manager of the estate. Hence the defendant contends that under section 3 (3) (c) of

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the Act, as he has now been adjudged the heir to Ram Chandra Dhal who died in 1887, he was at the time of the execution of the contract incapable of contracting, and *secondly*, when the estate again was taken charge of on the 22nd August 1905, the present suit, then pending, became barred.

The respondent, on the other hand, urges that, at the time when the contract was entered into, the defendant was neither the holder of the estate of Ram Chandra Dhal, nor his heir, and this is the view taken by the Subordinate Judge. He urges *secondly*, that the suit relates to properties outside Chota Nagpore and that it is only properties within the limits of Chota Nagpore that can be affected by the order declaring the estate to be taken charge of under the Act. Further, it is said the debt or liability contracted by the defendant is not one of the debts and liabilities specified in the written application, which led to the estate being taken charge of in 1905.

It seems to us, however, that though the defendant at the time he entered into the contract, had not been declared the heir to the estate of Ram Chandra Dhal, yet as soon as he was found to be the heir, he became heir from the time of the devolution of the estate, which was admittedly anterior to the execution of the contract. Though it may not be certain who at any particular time is the holder of an estate or who is the heir to a deceased person, there must always in the eye of the law be a holder of an estate and an heir to a deceased, so, when the defendants' rights were declared, they related back to the time of the death of Ram Chandra Dhal and the contract entered into by him became void for want of capacity on his part to contract.

The Subordinate Judge considers that when the estate became released from management, the contract revived. He says: "But the cessation of power to contract lasted so long as the management of the estate under the Act continued, *i.e.*, it was a mere suspension of the power to contract at the most. But it can not be the intention of the law that, after the management is withdrawn, any person should be allowed to avoid his own contract and so defraud *bonâ fide* creditors." We think, however, that the intention of the Act was to render the holder of an estate so taken charge of entirely incapable of contracting, and that a void contract cannot be revived. The case of *Gregson v. Uday Aditya Deb* (1), has been cited to us but that has no application, because it is not alleged in this case

(1) (1889) I. L. R. 17 Calc. 228.

that the defendant, after ceasing to be in a state of disability, took up and carried on transactions commenced while he was under disability in such a way as to bind himself as to the whole.

Again, when the estate was taken charge of under the Encumbered Estates Act for the second time, all pending suits, and the present suit was then a pending suit, became barred, and the Subordinate Judge ceased to have jurisdiction. It would seem to be immaterial where the immovable property sought to be affected is situate, or whether the debt, payment of which is sought for or the liability it is prayed to have declared, is specified in the application under the Encumbered Estates Act or not, for the words "debts and liabilities" in section 3 (1) of the Act have been interpreted in *Kameshar Prasad v. Bhikhan Narain* (1) and in *Jagadis Chandra Deo Dhabal v. Satrugan Deo Dhabal* (2), as meaning "all debts and liabilities" of the holders of the estate taken charge of, other than debts due or liabilities incurred to Government.

We must, therefore, decree appeal No. 85 of 1906, which we do with costs. It is unnecessary to decide appeal No. 101 of 1906, which is dismissed, but without costs.

N. K. B.

Appeal No. 85 allowed.

(1) (1893) I. L. R. 20 Calc. 609.

(2) (1906) I. L. R. 33 Calc. 1065.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

HARISH CHANDRA MANDAL

v.

JAGABANDHU DUTT AND OTHERS.*

Mortgage decree—Execution—Power of executing Court—Transfer of Property Act (IV of 1882), Sec. 89—Adjustment—Enquiry into—Civil Procedure Code (Act XIV of 1882), Secs. 244, 258.

The powers of the Court which is called upon to execute a mortgage decree are not confined within the four corners of the rules framed under section 104 of the Transfer of Property Act.

If an adjustment is pleaded, it raises a question relating to the execution or satisfaction, partial or otherwise, of the decree and the Court must enquire and determine how much is due and realisable under the decree at the time execution is sought.

The mortgagor may redeem at any time after the passing of the decree under section 89 of the Act before the actual sale and the Court has jurisdiction to investigate whether the decree has or has not been adjusted wholly or in part.

* Appeal from Appellate Order No. 89 of 1907 against the decision of A. Goodeve, Esq., District Judge of Birbhoom, dated 7th January 1907, affirming that of Babu Durgadas Chakravarti, Munsiff, Rampore Hat, dated 4th September 1906.

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1906.

Raja Satrugan Deo
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Raja Jagadish
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1906.

January, 3, 13,

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1908.

Harish Chandra
Mandal
v.
Jagabandhu Dutt.

Bibijan Bibee v. Sachi Bewah (1) applied.

Quære : Whether section 258 of the Civil Procedure Code being not mentioned in the Rules framed by the High Court, applies to proceedings in execution of a mortgage decree.

Kedar Nath v. Kali Churn (2) not followed.

Appeal by the Opposite Party, Decree-holder.

Proceedings in execution of a mortgage decree.

The material facts and arguments appear from the judgments.

Babu Nalini Ranjan Chatterji for the Appellant.

Babu Siva Prasanna Bhattacharjee for the Respondents.

C. A. V.

January, 13.

The following judgments were delivered :

Stephen J.—This is an appeal against the dismissal by the District Judge of Birbhoom of an appeal against an order by a Munsiff ordering an adjustment under sections 244, 258 of the Code of Civil Procedure. The facts are simple. The appellant before us was decree-holder in a mortgage suit brought against the respondent who was mortgagor. The suit had proceeded as far as the making an order absolute for sale under section 89 of the Transfer of Property Act, but no sale had actually been made, when the decree-holder accepted two sums of Rs. 39 and Rs. 136 from the mortgagor on the terms he would give up his claims for compound interest and sum of Rs. 80 in addition. The only point raised in the Court below was that no order could be made under those portions of the Civil Procedure Code that are not embodied in the Transfer of Property Act by means of rules under section 104.

In this Court the appellant contends that the decree having been made absolute under section 89 of the Transfer of Property Act the only way in which a legal effect could be given to the payment of money in respect of debt on which the decree was founded was by a certified payment or adjustment under section 258 of the Code, and that the authorities show that this section does not apply to such a decree.

The first part of this contention seems to me unsound. It has been laid down by a Full Bench of this Court in *Bibijan Bibi v. Sachi Bewah* (1) that a mortgagor does not lose his right to redeem when an order for sale is made absolute under section 89, Transfer of Property Act, but retains it till the sale has actually taken place. If he can redeem in full, there seems to be

(1) (1904) I. L. R. 31 Calc. 803.

(2) (1898) I. L. R. 25 Calc. 703.

no reason why he should not redeem in part. It may be that the account taken under section 86 cannot be re-opened ; but there is nothing in the Act to prevent the exercise of the Court's equitable powers to make allowance on the basis of the account for any payment made by the mortgagee while it is still open to him to make such a payment. If this is so, the Munsiff had power to make the order in this case irrespectively of sections 244 and 258 of the Code ; and it becomes unnecessary for me to consider the question whether the present order can be supported under these sections which are not embodied in the Rules made under section 104, Transfer of Property Act. I need not, therefore, discuss the authorities that have been quoted before us to show the effect to be given to the provision of the Code in the application of the Act. Though the order in the Court below is correct it must not be taken that I approve of the reasons there given. The appeal is dismissed with costs.

We assess the hearing fee at three gold mohurs.

Mookerjee J.—This is an appeal from an order made in the course of a proceeding for the enforcement of a mortgage decree. The question in controversy between the parties was as to the amount for the realization of which the decree-holder was entitled to take out execution. It was alleged on behalf of the judgment-debtors that in the course of a previous execution some payments had been made in partial satisfaction of the decree and that the parties had come to an adjustment under which the decree-holder had agreed to give up his claim for compound interest and to allow a certain remission. It has been found by the Courts below that the adjustment alleged by the judgment-debtors is established by the evidence and this finding is not challenged before this Court. But it is argued that the Courts below had no jurisdiction to deal with the matter of adjustment inasmuch as section 258, Code of Civil Procedure, has not been made applicable to execution proceedings on the basis of mortgage decrees by the rules framed by this Court under section 104 of the Transfer of Property Act. This contention which has been overruled by the Courts below is sought to be supported by a reference to the decision of this Court in the cases of *Kedar Nath v. Kali Churn* (1), and *Shyam Kishen v. Sunder Koer* (2). It is broadly contended that as section 258, Code of Civil Procedure, is not mentioned in the rules framed by the High Court, it is not applicable to proceedings in execution of a

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(1) (1898) I. L. R. 25 Calc. 708.

(2) (1904) I. L. R. 31 Calc. 373.

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mortgage decree and that consequently the Court has no power to deal with the question of adjustment alleged by the judgment-debtors. There may perhaps be some expressions in the judgment of this Court in the case of *Kedar Nath v. Kali Churn* (1), which may lend some apparent support to the argument, but in my opinion the contention is unfounded. It is conceded by the learned vakil for the appellant that if his contention is carried to its legitimate conclusion he would not be entitled to be heard before this Court at all ; for section 244, Civil Procedure Code, is not one of the sections mentioned in the rules and unless the order of which the appellant complains is treated as one made under that section, the appeal is incompetent. It is not necessary for the purposes of the present appeal to consider the scope of section 104 of the Transfer of Property Act or the effect of the rules framed thereunder. Upon this point there has been some difference of judicial opinion (see *Mallikarjunadu Setti v. Lingamurti Pantulu* (2), and *Kedar Nath v. Kali Churn* (1)). It is quite clear, however, that the powers of the Court which is called upon to execute a mortgage decree are not confined within the four corners of the rules framed under section 104 of the Transfer of Property Act. As explained in *Dakshina Mohan v. Basumati Debi* (3), section 104 is an enabling section and the rules made by the High Court under the provisions of that section do not limit the applicability of the provisions of the Code of Civil Procedure as regards sales held in execution of mortgage decrees. It may be pointed out that the contrary view put forward on behalf of the appellant would lead to the anomaly that as rules were not framed till 1892, that is, more than 10 years after the Transfer of Property Act had been passed, there could not have been in the interval any execution of mortgage decrees. Much stress was laid on behalf of the appellant upon the decision of this Court in the case of *Hatem Ali Khundkar v. Abdul Gaffur Khan* (4), in which the learned Judges appear to have expressed an opinion that section 258, Civil Procedure Code, is not applicable to application under section 89 of the Transfer of Property Act. Upon closer examination however, it is plain that the decision relied upon is of no assistance to the appellant. The learned Judges held that the execution Court has full power to ascertain what balance of the mortgage-debt is really outstanding at the time of the

(1) (1898) I. L. R. 25 Calc. 708.

(3) (1900) 4 C. W. N. 474.

(2) (1902) I. L. R. 25 Mad. 244 at 271.

(4) (1903) 8 C. W. N. 102

application and to make the order absolute for the realization of that amount only. It seems to me to be obvious that a Court which is competent to execute a mortgage decree is not only competent but that it is also its duty to determine how much is due and realisable under the decree at the time when execution is sought. If an adjustment is pleaded it raises a question relating to the execution or satisfaction, partial or otherwise, of the decree and no intelligible principle has been suggested why the powers of the execution Court should be deemed to be so restricted as not to cover an enquiry of this description. As pointed out by this Court in the case of *Bibijan Bibi v. Sachi Bewa* (1), a mortgagor has the right to redeem at any time until the sale of the mortgaged property has been completed and section 89 of the Transfer of Property Act does not prohibit the exercise of such right after the passing of an order absolute for sale and before the sale under such order has really taken place. If so, it is indisputable that the Court is competent after the order absolute has been made and before the sale actually takes place, to investigate whether the decree has or has not been adjusted in whole or in part. It follows, therefore, that whether section 258 of the Code of Civil Procedure be or be not treated as applicable to proceedings in execution of mortgage decrees, it was quite competent to the Courts below to deal with the matter of adjustment under section 89 of the Transfer of Property Act and section 244 of the Code. [*Ram Kamlessuri v. Sukhan* (2).] In this view of the matter the decision of the Courts below is manifestly right and ought to be affirmed.

N. K. B.

Appeal dismissed.

(1) (1904) I. L. R. 31 Calc. 863.

(2) (1902) 7 C. W. N. 172.

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Before Mr. Justice Mitra and Mr. Justice Caspersz.

RAJANI KUMAR DAS AND OTHERS

v.

GOUR KISHORE SAHA AND OTHERS.*

CIVIL.

1908.

January, 8, 9, 20, 21.

February, 5.

Transfer of Property Act (IV of 1882), Sec. 53—Defeating or delaying creditors—Considerations for transfer separable—If whole transfer void—Onus of proof—Prima facie case—Weakness of adversary's case.

A transfer of property, the considerations for which are separable, part being for valuable consideration and part for the intention to defeat or delay other creditors, is valid and enforceable with regard to the part which is for valuable consideration.

A mortgage was executed for a total sum of Rs. 8,500. It was found that Rs. 4,853 was actually advanced by the mortgagees, the evidence as to the balance Rs. 3,647 was extremely suspicious and seemed to be for the purpose of delaying another creditor who had obtained a decree on a *hatehitta*.

Held, there ought to be a mortgage decree on the footing of Rs. 4,853 being the principal money secured.

Ishan Chandra Das Sarkar v. Bishu Sheikh (1) and *Narayana Pattar v. Viraraghavam* (2) followed.

The party on whom the onus of proof lies must in order to succeed establish at least a *prima facie* case. He cannot on failure to do so take advantage of the weakness of his adversary's case.

Appeal by the Defendants.

Suit upon a mortgage bond.

The facts and arguments appear sufficiently from the judgment.

Mr. Caspersz, Babus Baikuntha Nath Das and Gunada Charan Sen for the Appellants.

Babus Nilmadhub Bose, Golap Chandra Sarkar and Sarat Chandra Dutt for the Respondents.

C. A. V.

February 5.

The judgment of the Court was delivered by

Mitra J.—This is an appeal in an action to recover Rs. 8,500 on a mortgage bond, dated the 18th March 1901. The plaintiffs, who carry on business at Ramchandrapur in District Tipperah by the name and style of "Kebal Krishna Mohon Raj Krishna Shaha" are the mortgagees; the Deb defendants (except the minor, Bipin Behary Deb, who has been exonerated, by the lower Court, from liability under the mortgage) are the mortgagors, and the Dass defendants, *i.e.* defendants Nos. 6, 7 and 8,

* Appeal from Original Decree No. 238 of 1905 against the decision of Babu Jogendra Nath Mukerji, Sub-Judge, Tippera, dated the 18th March 1905.

(1) (1897) I. L. R. 24 Calc. 825.

(2) (1899) I. L. R. 23 Mad. 184.

are attaching creditors of the mortgaged premises under a decree obtained by them against the Deb defendants. The Deb defendants carry on business at Ramchandrapur and Brahmanberia, in brass and bellmetal utensils, and they used to purchase such utensils on credit from the firm of the plaintiffs as well as the firm of the Dass defendants which was established at Brahmanberia.

The business of the plaintiffs at Brahmanberia, which was called *bhasan karbar*, was closed in the year 1304 B. S. and the accounts as they were adjusted at the end of that year shewed that the Deb defendants were indebted to the plaintiffs in the sum of Rs. 2,004-4-6-1. It appears that the adjusted accounts were duly signed by these defendants. *Hatchittas* for this sum were also duly signed by these defendants, in acknowledgment of their debt, in the succeeding years 1305 and 1306 B. S. On the 5th Chaitra 1307 B. S. the plaintiffs gave up their claim for annas 4-6-1, and a finally adjusted account was signed by the Deb defendants showing a debt of Rs. 2,004.

The Ramchandrapur accounts of the plaintiffs with the Deb defendants were also duly adjusted in successive years, and on the 5th Chaitra 1307, B. S. the amount payable by the Deb defendants to the plaintiffs was found to be Rs. 2,849. The Subordinate Judge has found, and we agree with him that, on the 5th Chaitra 1307, B. S., which corresponds with the 18th March 1901, the Deb defendants were indebted to the plaintiffs in the sum of Rs. 4,853 being the total of Rs. 2,004 and 2,849. The mortgage bond in suit covers this sum together with another sum of Rs. 3,647 which, it is alleged, was advanced in cash by the plaintiffs to the mortgagors on the execution of the mortgage. We, however, have very grave doubts as to the actual advance of the latter sum.

The story told on the side of the plaintiffs is that the Deb defendants asked for and obtained, this loan of Rs. 3,647 to enable them to pay certain sums to some of their other creditors and that they executed the mortgage bond in suit for the total sum of Rs. 8,500 *ie.* Rs. 4,853 and Rs. 3,647. They say that, out of the latter item Rs. 1,500 went towards the satisfaction of the debt due to the Das defendants, in respect of another of their firms, and that Rs. 500 and Rs. 800 were paid, respectively, to Durga Charan and Ram Narayan. The evidence, however, as regards these payments is meagre and unsatisfactory. Durga Charan and Ram Narayan have not been called, none of the Deb defendants have been examined, and no attempt has been made to

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produce their books or the books of the creditors showing these or any payments made. The plaintiff Ram Kanie Shaha did not himself see any of these payments being made and we cannot place full reliance on the testimony of the Gomastha Guru Charan Shaha. The payments, if they had really been made were capable of very satisfactory proof, but such proof is wanting. The defendants, it is true, might have rebutted the testimony of Guru Charan by examining Brindaban Chandra Shaha, but though the weakness of the evidence for the Das defendants might afford some strength to the plaintiffs, the evidence on the side of the latter is too weak for even a *prima facie* case, and the plaintiffs cannot legitimately derive advantage from the shortcomings of their adversaries. Even if Brindaban Chandra did receive Rs. 1,500 from the Deb defendants after the execution of the mortgage, there would be nothing to show that this sum was a part of Rs. 3,647 covered by the mortgage. It is not the case of the plaintiffs that they themselves made any payment to Brindaban. The payments of Rs. 1,500, Rs. 500, and Rs. 800, to the other creditors of the Deb defendants have not at all been proved.

In the absence of proof of appropriation by payment to creditors of either the whole or part of the sum of Rs. 3,647, the plaintiffs must fall back on their own books and the oral testimony of their witnesses. We, however, are unable to accept the books produced in Court as books kept in the ordinary course of business. Shib Chandra Shaha, who gave his testimony in the Lower Court and who, under our directions, has been examined in this Court, also, to clear up, if possible, certain doubtful matters in the account books, has admitted interpolations in the books. He has also failed to explain suspicious entries to which our attention was drawn by the learned counsel for the appellants. It is very doubtful, on their books, whether the plaintiffs, were in a position on the 18th March 1901, to pay to the Deb defendants Rs. 3,647 in cash. The accounts admittedly were kept in an unusual and awkward way, and the corroboration that they could have afforded to the oral testimony is wanting. It seems to us that the books, instead of affording corroboration, throw discredit on the transaction.

The oral testimony, consisting of the depositions of the plaintiff Ram Kanie Shaha and some of his assistants, is interested and unconvincing. Kali Kamal Chakravarti, on whom the lower Court has placed considerable reliance as an independent witness,

came to the scene of the mortgage transaction by mere chance, and he contradicts the other witnesses on material points.

The probabilities, also, are against the case made by the plaintiffs. The Deb defendants were largely indebted at the time, and their business was not in a satisfactory condition. On the 21st Falgoun 1306, corresponding with the 4th March 1900, they executed a *hatchitta* in favour of the Das defendants admitting a debt of Rs. 5,482-9-10. They failed to pay this debt in due time, and it was outstanding on the 18th March 1901. Their immovable properties were not of any considerable value. The plaintiffs themselves were their creditors and the debts due to them were annually increasing. No part of the sum of Rs. 2,004-4-6-1 due on the Brahmanberia account had been paid within three years. The mortgage had evidently been in contemplation for sometime before the transaction actually took place. The stamp for the deed was purchased on the 19th February, and, though it was executed on the 18th March, the document was not presented for registration until the 2nd May 1907. The deed makes the account covered by it repayable in six months. The case of an advance of a large sum of money to debtors, who were on the verge of bankruptcy, in the circumstances we have stated, wears an air of improbability. The meagreness and untrustworthy character of the evidence adduced to prove payment is not redeemed by any natural feature in the transaction, and, on the other hand, the patent improbability of the story costs additional discredit on it. We cannot, therefore, accept the finding of the Subordinate Judge on this point.

The conclusion we arrive at is that the real consideration for the mortgage was the original sum of Rs. 4,853 and that the item of Rs. 3,647 alleged to have been advanced on the 18th March 1901 was not actually advanced and that the entry to that effect in the books of the plaintiffs is fictitious.

It might be that there was a secret understanding between the mortgagors and the mortgagees that the sum of Rs. 3,647 would be retained by the latter as security for subsequent transactions or for payment to other creditors if the necessity arose. Such a case, however, was not attempted to be made. The case put forward is that payment was actually made simultaneously with the execution of the mortgage bond. There was thus a partial failure of consideration.

We have next to consider whether we should give the

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plaintiffs a decree on the footing of the mortgage being really one for Rs. 4,853, and direct a sale of the mortgaged premises as against all the defendants ; thus giving the plaintiff a preference over the claim of the Das defendants, or dismiss the suit so far as it based on the mortgage.

The Das defendants instituted a suit on their *hatchitta* about the time the mortgage was registered. That suit was numbered 448 of 1901. The suit was contested by the debtors, the Deb defendants. They failed in their opposition and a decree was made on the 18th December 1903. The debtors appealed to this Court but unsuccessfully. The Das defendants in the meantime executed their decree. The plaintiffs waited until then, notwithstanding that the mortgage money was due in 1901. They instituted the present suit on the 23rd February 1905. These are circumstances of grave suspicion and raise doubts as to the *bonafides* of the entire mortgage transaction. Did the plaintiffs enter into a covinous agreement with the Deb defendants to delay or defeat the creditors of the latter including their creditors the Das defendants and does the case come within section 53 of the Transfer of Property Act (IV of 1882) which follows the Statute 13 Eliz. C. 5. The peculiarity in the present case is that the consideration for the mortgage was partly valuable. The case does not come within the scope of the Bankruptcy Law and no question of undue preference directly arises.

Section 53 of the Transfer of Property Act enacts that every transfer of immovable property made with intent to defraud prior or subsequent transferees thereof for consideration or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated, or delayed. The section, however, saves the rights of transferees in good faith and for consideration. The section, also says that when a Transfer which has the effect of defrauding, defeating or delaying creditors is made "gratuitously or for a grossly inadequate consideration," the intention to defraud, defeat or delay may be presumed. A contrary presumption would necessarily arise if the consideration is meritorious or valuable. In *Copis v. Middleton* (1), Sir Thomas Phemer, Vice-Chancellor, observed, with reference to the Act of Elizabeth.—"A conveyance, therefore, to be affected by the Act, must be shown to be feigned, covinous and fraudulent and made with an intent to delay, hinder or defraud creditors."

(1) (1818) 2 Madd. 410 ; 17 B. R. 226.

In *re Jhonson Golden v. Gillam* (1), Fry J., said : "The fact that there is valuable consideration shows at once that there may be purposes in the transaction other than the defeating and delaying creditors and renders the case, therefore, of those who contest the deed more difficult." This was also the view adopted in *Harman v. Richards* (2), in which Lord Justice Turner observed :—"Those who undertake to impeach for *mala fides* a deed which has been executed for a valuable consideration have, I think, a task of great difficulty to discharge. [See also *Holmes v. Penny* (3), *Freeman v. Pope* (4)].

It has not been shewn by any evidence which may be said to be cogent that the transaction of mortgage between the plaintiff and the Deb defendants was entirely fraudulent or for a grossly inadequate consideration and was intended only to defeat or delay the realisation of the dues of the Das defendants. If the considerations for the mortgage (we use the plural number, to indicate the two different sums which make up Rs. 8,500), could not be separated from each other, there would be good grounds for holding that the transfer evidenced by the deed was fraudulent. In that case the failure of consideration to the extent of Rs. 3,647, taken with the other proved facts would lead to a reasonable conclusion that the mortgages intended to keep the mortgagors to defeat the realisation of the debt covered by the *hatchitta* in favour of the Das defendants. Such conduct on the part of the mortgagees and mortgagors would lead to the inference that they were acting in collusion.

We think, however, in the absence of direct authority on the point that the two parts of the consideration stated in the mortgage are separable and that effect may be given to the instrument to the amount of the consideration that was valuable. To that extent, the transaction cannot be regarded as fraudulent. The mortgagors did not with reference to the sum of Rs. 4,583 do any act not warranted by law to the prejudice of the Das defendants. Their action might be crafty and deceitful in one sense, and morally wrong, but the law does not prevent them from giving proper security for the advances actually made to them. It might also be that the plaintiffs had a *bona fide* intention of advancing the additional sum for enabling the mortgagors to carry on their business, that they put off payment until the money was needed or until registration of the deed but that as

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(1) (1881) 20 Ch. D. 389.

(2) (1852) 10 Hare, 89; 90 R. R. 297.

(3) (1856) 3 K. and J 90.

(4) (1870) L. R. 5 Ch. App. 538.

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the Das defendants either commenced their suit, or were about to do so for a larger sum than Rs. 3,647, the plaintiffs withheld payment of the additional sum. They might not have had any such intention as would invalidate the instrument under section 53 of the Transfer of Property Act. Their moral turpitude in making a false case afterwards in the present proceedings would not be sufficient to deprive them of their legal rights though a false case might reflect discredit on the original transaction.

We are supported in our conclusion by the views expressed in two Indian cases. In *Ishan Chunder Das Sarkar v. Bishu Sirdar* (1), it was observed that "mere knowledge of an impending execution against a transferor is not sufficient to make the transferee a transferee otherwise than in good faith, when it is not shown the intention of the transfer or was to defeat or delay the creditors of the transferor. Where the transferee is a creditor of the transferor, and accepts the transfer in satisfaction of the debt due to him, though with the knowledge that his doing so has the effect of defeating other creditors of the transferor, the transfer may come within the last paragraph of section 53 of the Transfer of Property Act." In the present case the plaintiffs may have made a good bargain in their own interest, but no such knowledge has been brought home to them as would make the transaction a mere sham. In *Narayana Pattar v. Viraraghavan Pattar* (2) it was said.—"No doubt a mere preference of one creditor to another and *a fortiori*, a mere *bona fide* security given to a creditor to the extent of his debt, is not written in the English Statute 13 Eliz. C. 5. and we also think it is not within section 53 of the Transfer of Property Act. But where a document given by way of such security goes further and secures debts not due, the effect is, *quoad* such fictitious debts to defeat or delay the creditors." This principle it seems to us is exactly applicable to the exclusion of the item of Rs. 3,647 improperly made a part of the consideration (Rs. 8,500) of the mortgage bond in suit.

So far as the debts were real the mortgage may be regarded as a good transaction : so far as they were fictitious that is so far as valuable consideration failed to pass, the mortgage must be held to be inoperative.

We are, therefore, of opinion that the decree of the lower Court should be set aside and that in supersession thereof, a decree should be passed by this Court on the footing of the original mortgage debt being Rs. 4,853.

(1) (1897) I. L. R. 24 Calc. 825

(2) (1899) I. L. R. 23 Mad. 181.

As regards costs the proportion of loss and gain to the contending parties is such that we cannot but direct that the parties should bear their own costs in both the lower Courts and this Court, but the amount of Court-fees payable on the mortgage money calculated on the above basis at the date of the institution of the suit and the hearing fee in the lower Court according to the ordinary scale, on the said sum, should be added to the mortgage debt and there will be a direction for sale of the mortgaged premises for the entire amount so found.

N. K. B.

*Decree modified.**Before Mr. Justice Rampini and Mr. Justice Sharfuddin.*

NITYA NUND HAZRA AND OTHERS

v.

MAHARAJADHIRAJ BEJOY CHAND MOHATAB.*

Chowkidari Chakran land—Putni, construction—Zemindar—Putnidar—Lands held by Chowkidar, revert to whom, on resumption.

In the absence of a contract to the contrary, the zemindar who appoints and dismisses chowkidars and is in enjoyment of their services since the creation of the putni lease is entitled to the lands held by the chowkidars after the resumption of such lands by the Government.

Girish Chandra Roy v. Hem Chandra Roy (1) distinguished.

Appeal by the Plaintiffs.

Suit for partition of certain Chowkidari Chakran lands.

The kabuliati runs as follows :—

Kamala Kant Roy, the Putni Tulukdar of Lot Gafuonda, in pargana Chowmaha, appertaining to your zemindary, pargana Habeli and others, not having paid the rent for the year 1223, permission for fresh-settlement of the defaulting (Mehal) was accorded by the Revenue Survey Office and proclamation was made for another (fresh) settlement, but no one bade for the settlement of the mehal at auction; therefore the possessors in the Mofussil have been called. I am in possession of Lot Bhatari in pargana Mozuffer Shahi, included in the said Lot. Accordingly I appeared and made application; you were pleased to grant the same. Thereupon I signed the Mofussil Taluk settlement paper of one Mouza, the said Lot Bhatari at a Jama of Rs. 724 (seven hundred twenty-four) I shall not raise any plea or claim for reduction or non-payment of the said Jama on the ground of inundation, drought and erosion and arrosion by river or loss &c. If I do any such thing the same shall be inadmissible. I shall pay the rent by good and current coin into your Zemindari Kachari by proper instalments

* Appeal from Appellate Decree No. 1912 of 1905, against the decree of Babu Aghore Nath Hazra, additional Subordinate Judge of Burdwan, dated the 8th July 1905, affirming that of Babu Debendra Prosad Bagchi, Munsif Third Court at Burdwan, dated the 30th January 1905.

(1) (1905) 5 C. L. J. 28.

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month by month regularly every year according to the Kistbandi given below. If a monthly instalment be not paid in the course of that month, then for the amount which, including the interest and damage according to law from the 1st day of the next following month, will become due at the end of the year, you will put up the said Taluk to sale and bring it into your own hands and if the whole amount with interest be not realized thereby, you will realise the same by the sale of my properties. I shall pay the rent on account of my said Taluk into your zemindari Kachari. I shall never apply for discharge (cancellation of the settlement) nor shall I get any. If I or any of my heirs ever make any application for discharge the same shall be inadmissible. If I make Taluk settlement of any Mehal, appertaining to the said Mehal, to any person at a low rent or through fraud, the same shall be void. If, in case of default of any instalment, you appoint a Sajwal his pay shall be borne by me and I shall engage an Amla to attend on the Sajwal. I shall not pay any thing on account of the Sajwal's pay over and above what will be mentioned in the Sanada (appointment letter). If any defalcation of the Tahabil is made by the Sajwal I shall have the account settled by the Sajwal and shall not raise any objection with reference to what may be due to the Sarkar (yourself) I shall not do anything contrary to the law. I shall keep intact the oldstanding customary allowance, for the service of God in the mofussil. I shall carry out without objection whenever any orders which may be received from the Civil and Criminal Courts and Collectorate calling for any papers according to statement and the orders in connection with the passing and marching of troops. In case I do otherwise I shall pay fine and costs for which I may be held liable. I shall take upon myself the liability of any orders as regards Pulbandi (construction of works) I shall carry out the orders which may be passed in respect of the Chakla. I have no concern with the Sarkari buildings, gardens and tanks which are in the Sarkar's Khas possession; I have no concern with the tanks, habilies, in the said mehal &c., which have been dug under your Sanad before my signature, nor shall I make any objection in that behalf, if I do any such thing, the same shall be rejected. With regard to the death or absconding of Chowkidars in the Police service or their appointment and dismissal, you will do all that is necessary to be done, I having nothing to do in the matter. I have no concern with the lands the rents whereof have been transferred into the Aima Daftar before the time of your Zemindary. If the former Mustagirs of the said Mehal have fraudulently created Lakhraj, Aima and Mokruri in their own names or in the Benami of their own relatives, I shall not confirm them, nor shall I myself create any in favour of any person. For these purposes I voluntarily execute this Kabuliat, dated the 22nd Jaista 1224 corresponding to 3rd June 1817.

The other facts of the case and arguments appear sufficiently from the judgment.

Babus Joges Chandra Roy and Nogendra Nath Ghose for the Appellant.

Mr. S. P. Sinha and Babus Basant Kumar Bose, Nalini Ranjan Chatterji, Rajendra Chunder Chuckerbutty, Lalit Mohun Ghose and Biraj Mohun Mojumdar for the Respondents.

The judgment of the Court was as follows :—

The suit out of which this appeal arises relates to certain *chowkidari chakran* lands, which the plaintiffs claim to have partitioned, as belonging to them.

Both the Courts below held that these *chowkidari chakran* lands do not belong to the plaintiffs, and disallowed their prayer for partition of them. The plaintiffs then appealed to this Court ; and my learned brother and myself heard their appeal on the 22nd May last. We were then of opinion that the terms of the *patta* or *kabuliat* on which the plaintiffs relied were somewhat ambiguous : we accordingly remanded the case to the first Court for the recording and consideration of certain evidence, which we consider had an important bearing on the question at issue in the case and which the first Court had excluded. That evidence was as to which of the parties was in enjoyment of the services of the *chowkidars* up to the date of the resumption of the lands by the Government, that is to say, whether the plaintiffs, *putnidars*, or the defendant, zemindar had enjoyed them. We directed that the Subordinate Judge, or the Munsiff, should take this evidence and submit it to us, with a finding as to the effect of such evidence. The evidence called for has now been recorded by the Munsiff ; and he has submitted it to us with his opinion. He first points out that there is no clear evidence to show that the services of the *chowkidars* were exclusively enjoyed by either party. He then says, with regard to the appointment of the *chowkidars*, that the District Superintendent of Police seems to have exercised this function ; and he observes that it may be that the *chowkidars* were nominated by the *Karta* of the plaintiff's family. But, on the evidence he holds that neither the *putnidars* (the Hazras) nor the zemindar, the Maharaja of Burdwan, appointed or dismissed any *chowkidars*. Then, with regard to the personal services rendered by the *chowkidars* to the *putnidars*, he again says the evidence on this point is not very clear ; and he observes :—" I should think that the work of calling in the tenants for realizations of rents used to be performed in the main by the *nagdis* and that the *chowkidars* helped in that work, not as servants of the plaintiffs, but in the hope of getting some *bukshish*." Then, with regard

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to other services, he says :—"The *chowkidars* rendered such services to the Maharajah, not directly, but through some other persons, who were said to have been the people of the Maharajah." Finally, he winds up as follows :—"The finding on the evidence on record, therefore, is that neither party to this suit had ever been in the enjoyment of the services of the *chowkidars* as of right. The *chowkidars* did render some help to the plaintiffs in realizations of rent from the tenants of the plaintiffs, but those services were not exacted as of right but done by the *chowkidars* in the hope of getting rewards therefor in the same way as they did the work of other people in the village."

Now, it seems to us that the evidence thus recorded affords little or no assistance in interpreting the *kabuliat* on which the plaintiffs base their claim.

We must now turn to the *kabuliat* ; and we would observe, in the first place, that the plaintiffs did not in the first instance, place much reliance on the *kabuliat* : because they challenged it as a forgery. Now, however, when it has been found to be genuine, they say that upon it they are entitled to the *chowkidari chakran* lands. It still appears to us that the terms of the *kabuliat* are ambiguous. But, if we scrutinize them, we consider that the plaintiffs are not entitled to these *chowkidari chakran* lands. The *kabuliat* begins by saying :—"Kamala Kant Roy, the *putni talukdar* of lot Gafonda, in Pergana Chowmaha, appertaining to your zemindary, Pergana Habeli and others, not having paid the rent for the year 1223, permission for fresh settlement of the defaulting (mehal) was accorded by the Revenue Survey Office and proclamation was made for another (fresh) settlement, but no one bade for the settlement of the mehal at auction ; therefore the possessors in the mofussil have been called. I am in possession of lot Bhatari, in pargana Mozuffer Shahi, included in the said lot. Accordingly I appeared and made application ; you were pleased to grant the same. There upon I signed the Mofussil Taluk settlement paper of one mouzah, the said lot Bhatari, at a *jama* of Rs. 724." This *kabuliat*, therefore, does not say that the executant is to take all the lands of Bhatari and enjoy and pay rent for the same. The executant simply says that he signs the mofussil Taluk settlement paper of one mouzah, the said lot Bhatari at a *jama* of Rs. 724. This *jama* of Rs. 724 must have been calculated upon the lands which were assessed with rent. Then, towards the conclusion of the *kabuliat*, the executant proceeds to say :—"I have no

concern with the *sarkari* buildings, gardens and tanks, which are in the *sarkar's khas* possession ; I have no concern with the tanks, habilies, in the said mehal etc." Then he says : * * with regard to the death or absconding of the chowkidars in the Police service, or their appointment and dismissal, you will do all that is necessary to be done, I having nothing to do in the matter."

Finally, he says :—" I have no concern with the lands, the rents whereof have been transferred to the Aima Daftar before the time of your zemindary."

Now, it will appear that, the first part of the *kabuliat*, deals with what has been conveyed to the executant thereof : and, towards the latter part, the exceptions from the demise are specified. This latter part first deals with the Sarkari buildings, gardens and tanks, and next with the chowkidars. Finally, it deals with the Aima Daftar lands. So that the clause with regard to the chowkidars is interpolated between the stipulations concerning two classes of lands which have been excepted from the lease. It, therefore, seems to us, from the position which this stipulation with regard to the chowkidars occupies that it means to except the chowkidari *chakran* lands from the subject of the lease. Then, it expressly says with regard to the death or the absconding of chowkidars in the Police service, or their appointment and dismissal, "you will do all that is necessary to be done." Thus it leaves the power of appointing and dismissing chowkidars to the zemindar. Hence the zemindar had full power to appoint or dismiss these chowkidars. In other words, the *kabuliat* makes the chowkidars the servants of the zemindar ; and when chowkidars are servants of the zemindar and are remunerated for their services by *chowkidari chakran* lands, then it would seem that those lands cannot have been conveyed to the executant of the *kabuliat*, but were excepted from the *kabuliat* and remained the property of the zemindar.

The learned pleader for the appellants has called attention to certain cases. The first of these is the case of *Upendra Narain Bhattacharya v. Protap Chandra Pardhan* (1). This was a case in which the *chowkidari chakran* lands were held to be the property of the *putni talukdar* ; but then, it appears from the judgment in this case that by the terms of the *putni* lease the *putnidars* were all entitled to resumed lands without adjustment of rent. The terms of the lease in that case were different from those in the present case. The next case referred to is that

(1) (1903) 8 C. W. N. 320.

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of *Kazi Newaz Khoda v. Ram Jadu Dey* (1). The terms of the lease in this case are also different from those of the present lease ; because the judgment says : " On the terms of the plaintiff's lease it would seem that the plaintiff is entitled to the lands in dispute. The lease conveys to the *putnidar* all the lands which the zemindar at the time of the execution of the lease is possessed of in the mouzah of which the *putni* was granted. The lands in dispute were then in the possession of the zemindar because he was enjoying the chowkidar's services in lieu of rent. The plaintiff is, therefore, certainly entitled to present possession of these lands." There is no evidence in this case to show that the zemindar was in the enjoyment of the services of the chowkidars before he granted the lease. But, however, this may be, the terms of the lease in this case do not convey anything to the plaintiff at all except the lands of lot Bhatari for which he agrees to pay a rent of Rs. 724. The last case to which the pleader for the appellant calls attention is that of *Girish Chandra Roy v. Hem Chandra Roy* (2). In this case it has been held that the fact that the zemindar was entitled to make an appointment to the office of chowkidar did not create in him an interest in the lands held by the chowkidars, which, upon resumption and transfer to the zemindar, would pass to the *putnidar* from whose lease they had not been excepted.

The judgment in this case, however, shows that the zemindar had only power to appoint, but not to dismiss the chowkidars, as the zemindar in whose favour the *kabuliat* relied upon in this case was executed, had the power to do. Then, it is further apparent from this judgment that the *putnidars* had, since the execution of their *putni kabuliat*, been in enjoyment of the services of the chowkidars. Now, that is certainly not shown to be the case in the present instance ; and it was for this reason that we wished to obtain evidence as to who had been enjoying the services of the chowkidars subsequent to the execution of the *kabuliat*, and remanded the case to the lower Court with this object. The evidence now recorded does not enable us to come to any definite conclusion on this point. That being so, the present case is different from that of *Grish Chandra Roy v. Hem Chandra Roy* (2).

We therefore see no reason to interfere with the decision of the lower appellate Court, and we dismiss this appeal with costs.

(1) (1906) I. L. R. 34 Calc, 109.

(2) (1905) 5 C. L. J. 28.

There are three sets of defendants, respondents ; but we allow two sets of costs only, which must be equally divided among the three sets of defendants, respondents.

A. T. M.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Geidt and Mr. Justice Woodroffe.

NATABAR GHOSE AND OTHERS.

v.

THE EMPEROR.*

Charge to Jury—misdirection—Material ingredient of offence not stated—Judge's opinion on facts—Jury sole judges of fact—First information Report.

A Sessions Judge in charging the jury in a case of culpable homicide not amounting to murder, omitted to tell them that they must come to a conclusion as to whether in causing the death of the deceased the accused had the intention to cause death or such injury as was likely to cause death or the knowledge that he was likely to cause death.

Held :—Such omission was a clear misdirection.

The Judge in giving his opinion on the facts must tell the jury that his opinion is not binding on them and that they were the sole Judges of fact.

If the First Information Report is properly made evidence, it must be read out to the Jury as a whole and if not, the Judge should abstain from all reference to it. He must not comment on it without placing it before the Jury.

Appeal by the accused persons.

Conviction under section 304 of the Indian Penal Code.

The facts and arguments appear from the judgment of Geidt J.

Mr. Mahamad-ul Huq and Babu Nagendra Nath Bhatta-chargee for the Appellants.

Mr. Orr (Deputy Legal Remembrancer) for the Crown.

The following judgments were pronounced :—

Geidt J.—The appellants have been convicted by the Additional Sessions Judge of Hooghly sitting at Howrah with a Jury, Natabar of the offence of culpable homicide not amounting to murder and the other three appellants of that offence read with section 149, Indian Penal Code. Three of the appellants have also been convicted of rioting armed with a deadly weapon

* Criminal Appeal No. 75 of 1908 against the order of S. B. Chowdhry, Esq., Additional Sessions Judge of Hooghly, dated the 22nd November 1907.

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and the fourth simply of rioting and they have been sentenced to various terms of imprisonment.

It is urged on their behalf that there has been material misdirection of the Jury. The Sessions Judge when dealing with the question which the jury had to consider, after stating the case for the prosecution, went on to observe as follows :

"In dealing with a charge of culpable homicide you have first of all to see whether a man is dead and whether he met with a violent end " and then the Sessions Judge referred to the medical evidence showing that the man had met with a violent death. The Sessions Judge goes on to say : " The question now is, had the accused any hand in causing this man's death ; also whether they formed members of an unlawful assembly in furtherance of the common object for which this act was committed."

It appears to me that these were not the only questions which the jury had to consider. There was one very important further question to which the Sessions Judge has omitted reference altogether, namely, the question whether in causing the death of the deceased the accused had the intention to cause death or such injury as was likely to cause death, or the knowledge that he was likely to cause death. This was a question on which the jury were bound to come to a finding before they could convict the appellant of culpable homicide. It is true that in the first part of his charge, the Sessions Judge explained the sections of the Penal Code defining ' murder ' and ' culpable homicide ' and he pointed out to them the distinction between the two. But in my opinion, that was not sufficient. When laying before the jury the questions which they had to consider, it was his duty to lay specifically before them the question I have indicated, and to tell them that before they could find the accused guilty of culpable homicide, they must find that the accused had either the intention or knowledge which I have mentioned above. It appears to me that in this matter there has been a very material misdirection of the jury.

In some other respects, the charge is not satisfactory. The accused Nos. 2 and 4 pleaded that they had not been present at the occurrence. The Sessions Judge does refer in the beginning of his charge to the plea but omits all reference to it in the subsequent part of his charge and he does not tell the jury, as he ought to have told them, that with reference to the accused 2 and 4 they must, before they convict them, find that they were present at the occurrence.

Then again, the Sessions Judge has, in my opinion, somewhat misrepresented the effect of the medical evidence.

The Assistant Surgeon who examined the two accused persons Notobar and Toostoo deposed that the wounds on them might have been self-inflicted. The Sessions Judge has represented this evidence as showing that in the opinion of the Assistant Surgeon they were self-inflicted ; and though he afterwards used the expression that in the Civil Surgeon's opinion the wounds could be self-inflicted, he said that this was an opinion which militated against the evidence for the defence.

Then again, the charge is unsatisfactory in that the Sessions Judge has expressed his opinion on various questions of fact arising in this case without telling the jury that his opinion was not binding on them and that they were the sole judges of fact. He has made no reference to the separate function of the jury as the sole judges of fact.

There is one other point to which I may refer, namely, the matter of the First Information. The First Information seems to have been proved by the Sub Inspector, but it was apparently not read out to the jury. The learned Sessions Judge in his charge has commented on that First Information, but counsel for the appellants contends that the contents of that First Information have been mis-represented by the Sessions Judge. Whether that was so or not, it was clearly the duty of the Sessions Judge, if that First Information was properly evidence, to have placed it as a whole before the jury ; if it was not evidence, it was equally his duty to have abstained from any reference to it altogether.

In my opinion, there has been material misdirection of the jury. The conviction and sentence must, therefore, be set aside and a new trial ordered.

Woodroffe J.—I agree.

N. K. B.

Appeal allowed ; retrial ordered.

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Natabar Ghose
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Geidt, J.

CRIMINAL REFERENCE.

CRIMINAL,

1908.

February, 5.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

MOMIN MALITA.*

Criminal Procedure Code (Act V of 1898), Sec. 106 (3)—Order for security by Appellate Court—Conviction by Court other than of the description mentioned in the first paragraph of the section—Restriction of powers.

An Appellate Court has no power under section 106 (3) of the Code of Criminal Procedure to order security to be given by the accused person, where he was not tried and convicted by a Court of the description mentioned in the first paragraph of section 106.

Where a District Magistrate on appeal ordered a person who had been convicted by a Second-class Magistrate to give security :

Held, the order was bad and must be set aside.

Muthiah Chetti v. Emperor (1), *Paramasica Pillai v. Emperor* (2) and *Mahmudi Sheikh v. Aji Sheikh* (3) followed.

Reference by the Sessions Judge under section 438 of the Criminal Procedure Code.

Order to give security under section 106 (3).

The facts appear from the judgment.

Mr. Orr, (*Deputy Legal Remembrancer*) for the Crown.

The judgment of the Court was delivered by

Rampini J.—This is a reference under section 438, Code of Criminal Procedure by the Sessions Judge of Nadia, who invites us to set aside an order passed by the District Magistrate of Nadia, directing, under section 106 (3) of the Code of Criminal Procedure, a person named Momin Malita, to execute a bond for Rs. 100, with one surety of Rs. 100, to keep the peace for two years.

The learned Sessions Judge points out that Momin Malita was convicted by the Sub-Deputy Magistrate of Kushtia (a second class Magistrate) under section 323, Indian Penal Code, and sentenced to a fine of Rs. 25 ; that he appealed to the District Magistrate, who dismissed his appeal, and passed the above order, under section 106, Code of Criminal Procedure, binding him down to keep the peace. He further points out that as the order convicting the said Momin Malita, under section 323, Indian

* Criminal Reference No. 18 of 1908 by J. N. Ghose, Esq., Sessions Judge, Nadia for setting aside an order passed by J. A. Ezechiel, Esq., District Magistrate of Nadia, on the 30th November 1907.

(1) (1905) I. L. R. 29 Mad. 190.

(2) (1906) I. L. R. 30 Mad. 48.

(3) (1894) I. L. R. 21 Calc. 622.

Penal Code was passed by a Sub-Deputy Magistrate of 2nd class powers, such a Magistrate had no power to pass any order under section 106, Code of Criminal Procedure, and, therefore, he contends that a District Magistrate hearing an appeal from an order of such Magistrate, cannot pass such an order. In support of this view he cites the cases of *Muthiah Chetti v. The Emperor* (1) and *Paramasiva Pillai v. The Emperor* (2).

The learned District Magistrate shows cause ; and, according to his view, a District Magistrate has power to pass such an order in appeal from the decision of any Magistrate. In other words, he thinks that any appellate Court can, under Sub-section (3) section 106, Code of Criminal Procedure, pass an order without any restriction as to the powers of the Court against whose order the appeal is made.

We do not think that this view is right. According to the rulings cited by the Sessions Judge, an appellate Court cannot exercise the power given by section 106, Code of Criminal Procedure, when the accused has not been convicted by a Court such as is referred to in sub-section (1). And we may also refer to the case of *Mahmudi Sheikh v. Aji Sheikh* (3) in support of this view.

We, therefore, set aside the order of the District Magistrate, dated the 30th November 1907, directing, under section 106(3), Code of Criminal Procedure, the said Momin Malita, to execute a bond for Rs. 100 to keep the peace for two years.

N. K. B.

Order set aside.

(1) (1905) I. L. L. 29 Mad. 190.

(2) (1906) I. L. B. 30 Mad. 48.

(3) (1894) I. L. R. 21 Calc. 622.

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APPELLATE CIVIL.

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1903.

January, 21, 22.

April, 7.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.
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v.

SARODA PROSAD DEY AND OTHERS.*

Putni Regulation (VIII of 1819), Sec. 13 clause 4—Under-tenure-holder making deposit—Suit for possession, if necessary—Lien when extinguished—Statutory lien—Contract how revived—Estoppel—Silence—Statement by putnider, who has no interest, if binds transferee.

Per Stephen J.—A special suit to declare the lien, created by section 13, clause 4 of the Putni Regulation, terminated by satisfaction of the debt is unnecessary, when the plea of suit is set up as a reply to a claim for rent and the defendant uses it only as a basis for resisting that claim.

The creation of a *gribi* estate is a formal act both according to the language of Regulation VIII of 1819, section 14, and according to universal practice and cannot be inferred from the conduct of the parties.

When a contract has terminated, it cannot be revived unless by the incorporation of its terms in a new one.

Per Mookerjee J.—The under-tenure-holder who makes the deposit under section 13 clause 4 of Putni Regulation is entitled to remain in possession only so long as the full amount advanced, with interest, is not realized from the usufruct of the tenure. If, after his debt has been satisfied, he does continue in occupation, he does so at his peril and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagee in possession who stays on the premises after his dues have been satisfied.

The lien is extinguished by satisfaction of the debt from the profits of the the tenure. No order of the Collector is necessary in this behalf, nor is recourse to a regular suit essential to alter the legal position of the parties. The moment the lien is extinguished the defaulter becomes entitled to recover possession.

Section 13 clause 4 of the Putni Regulation makes it a condition precedent to the creation of the lien that the amount lodged should be advanced from private funds and should be paid by the tenure-holder after he had already paid the whole of the rent due from himself.

The lien in question is creation of the Statute; and statutory liens cannot be created by consent; the provision of the law must be strictly complied with before reliance can be placed upon the lien.

A mere treatment of the under-tenure-holder by the landlord as a usufructuary encumbrancer is not sufficient to create the statutory lien.

A statement in the plaint, unchallenged and made by the *putnider* after his interest had been transferred is in no way binding upon the transferee.

Joy Chandra v Sreenath (1) referred to.

When silence is of such a character and under such circumstances that it would be a fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel.

* Appeal from Appellate Decree No. 492 of 1905, against the decree of F. Roe, Esq., District Judge of Burdwan, dated the 16th December 1904, reversing that of Babu Annoda Prosad Bagchi, Additional Subordinate Judge of Burdwan, dated the 18th May 1903.

(1) (1904) 1 C. L. J. 23; 1 L. R. 32 Calc. 357.

Appeal by the Plaintiff.

Suit by a putnidar against darputnidars for arrears of rent.

The facts and arguments appear sufficiently from the judgments.

Babus Nalini Ranjan Chatterjee and Rajendra Chunder Chuckerbutty for the Appellant.

Babus Lal Mohun Doss and Sarat Chunder Dutt for the Respondents.

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The judgments of the Court are as follows :

Stephen J.—The plaintiff in this case who is the appellant before us bought the putni Mehal, Lot Sri Kishnapur at an auction-sale held in the execution of a money decree in 1895. He now sues the *durputnidars* under his *putni* for arrears of rent due from them. This claim is met by the defendant respondents by an assertion on their part of a usufructuary lien on the property founded on a payment by them as *durputnidars* of arrears of rent due from the *putnidars* to the superior landlord.

The facts of the case are somewhat complicated. The *putni* is an old one and in 1862 was sublet to Golam Chundra Dey and other *durputnidars*. In the same year, on the *putnidars* falling into arrear with their rent, those of the *durputnidars* who are now respondents, paid those arrears and thus obtained a usufructuary right in the putni. In November 1867 two petitions were filed in the Munsiff's Court, Exhibits XXIX and XXX in this record, one by Manik Lal, the *putnidar*, the other by Golam Chundra Dey, the *durputnidar*, stating that the *gribi* right of the latter had been duly paid off by means of his usufruct. No orders were passed on these petitions, but their authenticity has been found as a fact in the present suit. The *durputnidars* subsequently paid off the debt due to the Zemindar, and paid the balance of the rent to the *putnidars*. Later the estate again fell into difficulties and the *putnidars* defaulted in their rent. The *durputnidars* also failed to pay their rent but on the putni being put up for sale put in a petition in November 1882 reciting that the *putnidar* had failed to pay his rent in order that the *durputni* right might be extinguished and paying in the amount of the landlord's claim. In this petition Golam Chunder describes himself a *dur-putnidar* and makes no mention of any existing *gribi* right. In 1885 a suit was brought by one Hari Das Saijal claiming as *putnidar* on a title which we can take as bad, and the suit was dismissed on the plea that the *durputnidar* had the

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usufruct now claimed. In 1895 the *putnidars* again got into difficulties and the putni was sold in execution of a money decree to the present plaintiff, who thereupon took it with the liabilities that attached to it in the hands of his predecessors of whom Hari Das Saijal was not one. In 1895 there was instituted another suit by Jogendra Lall Karpur, the outgoing putnidar, against the *durputnidars* for accounts, his claim being based on the continued existence of the *durputnidars'* usufruct from 1867 to the date of suit, which is clearly alleged in a passage from the plaint quoted by the District Judge. To this suit the present plaintiff was a party as defendant, he did not demur to the allegation referred to. The suit was decreed in Jogendra's favour, both in the first and the Appellate Courts, and their decision was ultimately upheld in this Court, but the plaintiff was no party to the first or other appeals. Meanwhile another suit had been instituted in 1896 by Golam Chunder Dey the *durputnidar*, against the plaintiff and others, claiming certain money deposited by the latter to meet claims for rent preferred by the plaintiff. In this suit Golam Dey's claim to *gribi* right is made the foundation of the suit, and is denied by the present plaintiff on the 14th January 1897 on the ground of the two petitions to which I have referred. This suit was withdrawn by the plaintiff Golam Dey on payment of the defendants' costs, on the 6th December 1898, leave being granted to him to bring another suit, which he never did. Once again default was made in the *putni* rent and in 1899 the defendants Nos. 5, 10 paid the rent due to the zemindar and acquired a *gribi* right, but the plaintiff now sues for rent due for the period between the auction sale and the time of the *gribi*.

On these facts it is contended before us that the suit is misconceived and that as the plaintiff denies the existence of the *gribi* right he must, by force of Regulation VIII of 1849 section 13 (4), bring a suit for the purpose of having it shown that the *durputnidars'* claim has been paid off. If the usufruct was admitted and if the plaintiff was attempting to recover his property after its termination this argument might have some force. But as it is, it is set up as a reply to a claim for rent and the defendant uses it only as a basis for resisting that claim: a special suit to declare it terminated is, therefore, quite unnecessary.

The real point we have to decide is whether the defendants 1—4 have established the *gribi* right that they have set up; and as the *onus* of proving this is on them, it must first be considered now for the ground on which it is sought to found it is sound. It

is admitted by the advocate for the defendant *durputnidars* that nothing that occurred in Jogendra's suit of 1895 can be treated as estoppel of the present plaintiff and still less as supplying *res-judicata*. The plaintiff's greatest possible interest in that suit was of the slightest, and as far as his interests in that suit were concerned, he had no need to deny the allegation set out in the District Judge's judgment, a fact which is strikingly brought out by his name being omitted from the cause title of the appeals in that suit. The defendant is therefore thrown back to the original transaction in 1862 when a *gribi* was no doubt created, combined with the subsequent advance made in 1882. Now the petitions of 1867 never seem to have been acted on, but that of Golam Chunder Dey supported as it is by that of Manik Lal is strong evidence at least that the purpose for which the usufruct was created has been satisfied and therefore that the *gribi* had come to an end. Can what happened in 1882 be taken to have revived the old usufruct or to have created a new one? The *dur-putnidar* again paid the *putnidars'* rent; but did he thereby get any usufruct of the *putnidar's* estate? In my opinion he did not, because the creation of such a usufruct, that is the creation of a *gribi* estate, is a formal act both according to the language of Regulation VIII of 1819 section 14, and according to universal practice, and can not be inferred from the conduct of the parties even if it be as stated by the District Judge. If the payment in 1882 did not create a new usufruct I can not see how it can be held to revive the old one in any way. When a contract has terminated it can not be revived, unless by the incorporation of its terms in a new one which I consider did not happen in this case. Hari Saijal Das' suit shows that the present claim to a usufruct was alive at that time; otherwise it can not in any way affect the plaintiff's rights. The same may be said of Jogendra's suit in the view that I have expressed as to it. In this way all the grounds on which it has been sought to found the defendants' case seem to me to fail. On the other hand we have the suit by the present defendant against the present plaintiff in 1896, where the present claim made by the defendant was asserted, denied and withdrawn. Though this does not amount to *res-judicata* it comes very nearly to the same thing and is strong evidence in favour of the plaintiff. Next we have the finding of the first Court that the *durputnidars* paid rent to the *putnidars* up to 1885, supported by appropriate dakhilas. These two facts would constitute strong evidence against the defendant's case were it better founded than it is. As

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the case stands, it is unnecessary to consider them further. The result is that the appeal succeeds and must be allowed with costs. The plaintiff is also entitled to his costs in the Court below.

Mookerjee J.—The circumstances which have given rise to the litigation out of which this appeal arises, are apparently of some complexity, but in so far as it is necessary to state them for purposes of this appeal, they are fairly simple and by no means difficult to ascertain. On the 17th February 1811 the Maharaja of Burdwan created a putni which, after various transfers to which no detailed reference is necessary, was acquired by purchase by the plaintiff appellant on the 6th May 1895. On the 16th May 1862, the putnidar created a *darputni* in favour of the respondent. The present action was commenced on the 1st February 1901 for recovery of arrears of rent in respect of this *darputni*. It is not disputed that during the year in respect of which rent is claimed, the *putni* was owned by the plaintiff, while the defendant was the *darputnidar*. But the claim was resisted substantially on the ground that the defendant was, during these years, in possession of the putni-interest as the holder of an usufructuary lien created under section 13 of Regulation VIII of 1819. It was alleged that so far back as 1862, the then putnidar made default in payment of rent to the zemindar, with the result that proceedings were instituted on behalf of the latter under the Putni Regulation. On the 17th November 1862, the defendant satisfied the dues of the zemindar and obtained possession of the putni under clause 4 of section 13 of Regulation VIII of 1819. It was contended on behalf of the defendant that his right to possession as the holder of an usufructuary lien had not terminated up to the period for which the *putni* rent is claimed and that consequently the plaintiff was not entitled to recover any rent in his character of *putnidar*. Other questions also were raised in the Court of first instance but not pressed at any later stage of the proceedings and none has been mentioned in this Court. The Subordinate Judge found that the lien had been satisfied, and that the plaintiff was entitled to exercise his rights as *putnidar*; consequently, on the basis of an account taken by himself, he made a decree in favour of the plaintiff. The learned District Judge has reversed that decision. He has held that there has been an usufruct in legal existence since 1862 and in actual existence since 1882, with the result that as the defendant is still in occupation as usufructuary incumbrancer, the plaintiff is not entitled to claim any rent.

The plaintiff has now appealed to this Court and on his behalf it has been argued that upon the facts, as to which there is no substantial dispute at this stage, the usufruct did in fact as well as in law cease to exist at a date long anterior to the period for which rent is claimed. Before I examine the questions of law which have been raised, it is necessary to re-state the facts as they have been found by the Courts below.

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As I have already pointed out, by virtue of the payment made by the *darputnidar* on the 17th November 1862, he came into possession of the *putni* under clause 4 of section 13 of the Putni Regulation of 1819. The result was that the defendant was in the position of an usufructuary mortgagee entitled to continue in possession till he had recovered the amount advanced by him, together with interest, from the profits belonging to the *putni*. Now, in the course of the present litigation, two applications were produced which were made to the Collector on the 13th November 1867, one by the *putnidar*, and the other by the *darputnidar*. The Courts below have found that these petitions have been produced from proper custody and that there is no possible controversy as to their genuineness. They recite the payment of 1862, the creation of the usufructuary lien, the entry into possession by the *darputnidar* as an incumbrancer, and the satisfaction of the debt from the profits of the *putni* by the end of July 1866. These applications by themselves prove beyond the possibility of any doubt that the lien was extinguished about the year 1866. But as the learned Judge points out, this conclusion is materially strengthened by three circumstances. In the first place, the amount advanced by the *darputnidar* to satisfy the demand of the zemindar in 1862 was a little over Rs. 1300, and as the profits of the *putni* exceeded Rs. 400 a year, the debt together with interest at the statutory rate, would be wiped out from the usufruct about the year 1866. In the second place, in 1882 there was another default in payment of the rent to the zemindar, and on that occasion the present defendant applied to the Collector for leave to make the deposit. This procedure would be unintelligible if the usufructuary incumbrance of 1862 was still in force, because upon that hypothesis the present defendant would in 1882 be still in occupation of the *putni* in supersession of the rights of the *putnidar*, and the default in payment of the rent to the zemindar would be his own default, so that no leave would be necessary from the Collector to enable him to satisfy the claim of the zemindar.

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In the third place, about the year 1896 the plaintiff sued the Mozumdars, another set of *darpatnidars*, for arrears of rent. They set up the title of the present defendant and deposited the amount due in Court. The defendant thereupon brought a suit for declaration of his title to receive the amount deposited as against the plaintiff. The plaintiff resisted that claim with the result that the defendant withdrew the suit with liberty to bring a fresh suit, which he never did, and subsequently the amount deposited was withdrawn by the plaintiff in satisfaction of his claim. Under these circumstances, it must be held as the Courts below have done, that the usufructuary lien of 1862 was satisfied and extinguished in 1866. This is further corroborated by the circumstance that in 1867, the *darputnidar* who had overpaid himself as he had received more than what was due to him in satisfaction of the debt, repaid the amount to the *putnidar*. If, therefore the usufructuary lien vanished in 1866, on what conceivable ground is the defendant entitled to resist the claim of the plaintiff for *putni* rent? His claim is sought to be resisted, as I understand upon three grounds of law, namely, *first*, that under section 13 clause 4 of the *putni* regulation the *putnidar* who has been deprived of possession is not entitled to recover possession except by suit and that till he has so recovered possession, he is not entitled to recover any rent; *secondly*, that the usufructuary lien even if it was extinguished in 1866 was revived by consent of parties in 1882; and is still in force, and *thirdly*, that the plaintiff is estopped by his conduct in a previous litigation from asserting that the usufructuary lien was extinguished in 1866.

As regards the first of these grounds, it must be tested in the light of the provisions of the statute. Section 13 of Regulation VIII of 1819 entitles the person who has lodged the amount claimed by the zemindar from his own private funds to obtain possession of the tenure of the defaulter in order to recover the amount advanced from the profits of the *putni*. It is obvious, therefore, that the under-tenure-holder who makes the deposit is entitled to remain in possession only so long as the full amount advanced with interest, is not realised from the usufruct of the tenure. If, after his debt has been satisfied, he does, as a matter of fact, continue in occupation, he does so at his peril, and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagor in possession who stays on the premises after his dues

have been satisfied. It was suggested, however, that it would be necessary for the *putnidar* who has been deprived of possession, to bring a regular suit to recover possession ; and stress was laid upon the concluding words of the last paragraph of section 13, in which it is stated that the defaulter shall not be entitled to recover his tenure except upon repayment of the entire sum advanced or upon proof in a regular suit to be instituted for the purpose that the full amount advanced has been realised from the usufruct of the tenure. It does not appear to me to be a reasonable construction of this section to hold that in every case there must be a regular suit by the defaulter against the usufructuary encumbrancer. If this were the right construction, suits of this description ought to be of universal occurrence. I am unable to hold that the legislature precluded the possibility of the defaulter obtaining amicable possession from the holder of the usufructuary lien after the dues of the latter have been satisfied. This is precisely what happened in the present case. The petitions of 1867 show that the parties came to an agreement, that the debt due had been satisfied, and that the defaulter was consequently entitled to re-enter upon the property ; and, further, as has been concurrently found by the Courts below, for many years down to about 1882, the *putnidar* was in possession by receipt of rent from the *darputnidar*. It was also suggested that as the Collector to whom the petitions were presented in 1867 passed no orders thereupon the lien was not extinguished. I am unable to say that there is any solid foundation for this argument. The lien is extinguished by satisfaction of the debt from the profits of the tenure. No order of the Collector is necessary in this behalf nor is recourse to a regular suit essential to alter the legal position of the parties. The moment the lien is extinguished, the defaulter becomes entitled to recover possession and if the under-tenure-holder, who held the encumbrance, amicably restores him to possession, nothing further remains to be done. The first ground, therefore, upon which it is argued that the usufructuary lien continued beyond 1866 cannot be supported.

The second ground which seems to have been accepted as well founded by the learned District Judge raises the question, whether the usufructuary lien was revived by consent of parties in 1882. It may be pointed out at once that no usufructuary lien was created by the payment which was made in 1882. Section 13 clause 4 of Regulation VIII of 1819 makes

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it a condition precedent to the creation of the lien that the amount lodged should be advanced from private funds and should be paid by the tenure-holder after he had already paid the whole of the rent due from himself. Now it has been found by the District Judge that the defendant took advantage of the troubles in the family of the *putnidar* and failed to pay his rent to his landlord. The deposit, therefore, of 1882 was in no sense an advance from private funds and could not possibly create the lien contemplated by section 13 clause (4). The defendant, consequently, has to fall back upon the theory that the lien was created or revived by consent. It is not explained, however, when or how the consent was given. But it is not necessary to deal with this aspect of the matter in detail because the lien in question is a creation of the statute, and statutory liens cannot be created by consent; the provisions of the law must be strictly complied with before reliance can be placed upon the lien as a creation of the statute. It is suggested that from 1882 onwards, the defendant treated himself and was treated by his landlord as a usufructuary. No explanation, however, is given as to this alleged course of conduct. At any rate, it is plain, that this would not, by itself, be sufficient to create the statutory lien. The view taken by the District Judge, that if an usufruct can be removed by mutual consent, it can be created by mutual consent, cannot therefore be supported upon any intelligible legal principle.

The third ground upon which the usufructuary lien was sought to be founded raises a question of estoppel. This ground met with considerable favour from the learned District Judge but no serious endeavour was made before this Court to support the position and an examination of the reasons set forth in the judgment of the lower Court shows conclusively that there is no possible foundation for any estoppel. It appears that in 1885 a person, by name Haridas, who claimed to have acquired the right to collect the *durputni* rent by virtue of an *ijarah* lease granted in his favour by the *putnidar*, brought a suit for rent against the defendant. The defendant among other pleas set up the defence that he was an usufructuary encumbrancer in possession of the *putni* and was not liable to pay any rent. This contention prevailed and the claim for rent was dismissed. This does not in any way affect the position of the present plaintiff who cannot be said to claim through either of the parties to that litigation. In 1896, however, that is shortly after the plaintiff had acquired title to the *putni*, the *putnidar* whose interest had

been sold out, brought a suit against the present defendant for accounts, upon the allegation that, as asserted by the latter in the litigation of 1885, he was an usufructuary encumbrancer, that his lien had been extinguished and that he had received out of the profits of the *putni* sums considerably in excess of his legitimate dues. To this litigation, the present plaintiff appellant was made a *proforma* defendant. So far as we can gather, the present plaintiff did not contest that suit and in fact after the litigation had concluded in the Court of first instance, he was omitted from all subsequent stages including an appeal to the District Judge and to this Court. It is obvious, therefore, that he is in no way bound by the ultimate result of that litigation. It was suggested however, before the District Judge and the contention was accepted by him as well-founded that as the present plaintiff omitted in that litigation to challenge the statement made in the plaint that the defendant was an usufructuary encumbrancer in possession, he was bound by the doctrine of estoppel to adhere to that position. This view of the matter seems to me to be hopelessly untenable. In the first place, the statement in the plaint which was not challenged was made by the *putnidar* after his interest had been transferred and such a statement is in no way binding upon the transferee (see *Foy Chundra v. Sreenath* (1) where it was pointed out that a purchaser of immovable property cannot be estopped by the result of a suit against his transferor commenced after the purchase). In the second place, the present plaintiff was not a necessary party to that litigation and no relief was claimed as against him. No rights of his were in controversy in that suit as framed and as a matter of fact he was not brought before the Court by either of the parties really interested, in the later stages of the litigation. In the third place, if as the learned Judge holds, the omission of the present plaintiff to challenge the statement in the plaint as to the continued existence of the usufructuary lien estops him from denying that statement, it must first be established that it was the duty of the plaintiff to speak under the circumstances, for as was pointed out in *Foy Chundra v. Sreenath* (1), the duty to speak arises wherever and only where silence can be construed as having an active property, *namely*, that of misleading. To make the silence of a party operate as an estoppel, the circumstances must have been such as to render it his duty to speak. It is essential that he should have had knowledge of the facts and that the adverse party

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(1) (1904) I. L. B. 32 Cal. 357; 1 C. L. J. 23.

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should have been in ignorance of the truth and have been misled into doing that which would not have been done but for such silence ; in other words, when silence is, of such a character and under such circumstances that it would be a fraud upon the other party for the party which has kept silence to deny what his silence has induced the other to believe and act upon, it will operate as an estoppel. Tested in the light of this principle, the contention of the defendant has no foundation. The present plaintiff who was joined as a proforma defendant was under no obligation to challenge the statement of the then plaintiff as to the continued existence of the usufructuary lien, nor can it be suggested with any show of reason that such omission on his part, did in any way alter or affect the position of the defendant. In fact, the then plaintiff relied upon the position which the defendant had himself taken up successfully in the rent suit of 1885. It is inconceivable that the defendant who in 1885 had set up the existence of the usufructuary lien should have been prejudiced in any way by the omission of the present plaintiff to challenge the correctness of the statement made by the plaintiff in the suit of 1896. I feel no doubt whatever that the defendant cannot rely upon any conceivable application of the doctrine of estoppel in support of his case. The third ground, therefore, upon which the defendants sought to support the interposition of the alleged usufructuary lien is entirely untenable.

Upon an examination of the undoubted facts of the case and of the principles of law applicable thereto, it is manifest to my mind that there is no substantial defence to the claim. I feel convinced that the defendant has made a resolute attempt to keep the plaintiff out of his *putni* rent by recourse to a stale usufructuary lien created in 1862 which was in fact extinguished many years ago and cannot at this distance of time debar the plaintiff from the enjoyment of his rights as *putnidar*. No argument was addressed to us, and none appears to have been addressed to the Court below, as regards the precise amount which the plaintiff is entitled to recover if it is once established that the alleged usufructuary lien has no existence and is no effective bar to his claim.

The result, therefore, is that this appeal must be allowed, the decree of the District Judge discharged, and that of the Subordinate Judge restored. This order will carry costs in all the Courts.

A. T. M.

Appeal allowed.

Before Mr. Justice Brett and Mr. Justice Sharfuddin.

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Evidence Act (I of 1872), Sec. 90—Presumption, how weakened—Lessor and lessee—Adverse possession—Non-payment of rent, if creates adverse possession—Lessee holding over—Limitation Act (XV of 1877), Sch. II, Art. 139.

The Court may presume the genuineness of a document more than 30 years old, if it be produced from proper custody, but the effect of the presumption may be weakened by circumstances which tend to raise doubts as to its authenticity.

Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly asserts such a title to his knowledge and gives him notice that he asserted such a title.

A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession.

Rungo Lall Mundul v. Abdul Guffoor (1) and Tatia v. Sada Shie (2) referred to.

If a lessee holds over after the expiry of the lease and if no subsequent arrangement is arrived at between him and his lessor by which a new tenancy is created, time begins to run under article 139, Sch. II of the Limitation Act, against the lessor from the date of the expiry of the lease.

Kanthappa Raddi v. Sheshappa (3) and Chandri v. Daji Bhan (4) followed.

Adimulam v. Pir Ravuthan (5) dissented from.

Appeal by the Plaintiffs.

Suit for declaration of right and for khas possession.

The facts of the case and argument appear sufficiently from the judgment.

Messrs. Hill and St. John Stephen and Babus Lal Mohun Doss and Upendra Gopal Mitra for the Appellants.

Dr. Ras Behary Ghose and Babu Shiba Prosonno Bhatta-charjee for the Respondents.

C. A. V.

* Appeal from Original Decree No. 216 of 1905, against the decree of Babu Mohim Chunder Sircar Subordinate Judge of Manbhum, dated the 23rd March 1905.

(1) (1878) I. L. R. 4 Calc. 814. (2) (1882) I. L. R. 7. Bom. 40.

[† See *Rameshar Koer v. Gobardhan Lal* (1907) 7 C. L. J. 202 at 214—Rep.]

(3) (1897) I. L. R. 22 Bom. 893.

(4) (1900) I. L. R. 24 Bom. 504; 2 Bom. L. R. 491.

(5) (1885) I. L. R. 8 Mad. 424 [This case is followed in *Srinivasier v. Mathusami Pillai* (1900) I. L. R. 24 Mad. 246, but declared to be not good law in *Vadappalle Narasimham v. Dronamraju* 18 M. L. J. 26 at 29—Rep.]

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The judgment of the Court is as follows.

This is an appeal arising out of a suit instituted in the Court of the Subordinate Judge in the District of Manbhum for a declaration of the right to a 12 annas share of mouza Deoli and for khas possession of the surface and subsoil rights in the said property.

The plaintiffs' case is as follows:—The whole of mouzah Deoli with the subsoil rights was the Debutter property of the late Parmanand Gossain who was in possession during his lifetime and was succeeded by his four surviving sons who in their turn remained in possession of the said mouzah in four equal shares.

Parmanand Gossain had two wives ; by the first he had four sons, namely Peyari Lal Gossain, Chuni Lal Gossain, Munni Lal and Jadavananda Gossain, and by his second wife he had three sons namely Tikaram Gossain, Lal Chand Gossain and Kristo Gossain. From the evidence on the plaintiffs' side it appears that Munni Lal one of the sons by the first wife and Lal Chand Gossain and Kristo Gossain two of the sons by the second wife died childless during the lifetime of their father, and they have nothing to do with the present case. Peyari Lal Gossain was the paternal grandfather of plaintiffs Nos. 1 to 4 and plaintiffs Nos. 5 to 10 are the heirs in the line of Jadavananda Gossain abovementioned. Chuni Lal Gossain's branch of the family having become extinct his share amounting to 4 annas in the property devolved on his two uterine brothers namely Peyari Lal Gossain and Jadavananda Gossain. Hence the ancestors of the present plaintiffs obtained possession of a share of 12 annas of the whole of the property left by the late Parmanand Gossain and now the present plaintiffs, as the surviving male members of the elder branch of the family of Parmanand through his first wife, are in possession of that 12 annas including 12 annas of mouzah Deoli. Tika Ram Gossain the surviving son of Parmanand Gossain by his second wife held only the remaining 4 annas and was in possession thereof during his lifetime, and after his death his son Hira Chand Gossain and after Hira Chand's death his son Nilmoney Gossain succeeded one after another to this four annas share, and defendants Nos. 1 and 2, namely Lakshmi Narayan Gossain and Ramtaran Gossain (who are the sons of the sisters of Nilmoney Gossain) as representatives in interest of the line of Tikaram are entitled to hold the said 4 annas share only.

On the 2nd Sravan 1247 (10th July 1840) Babu Debendra Nath Thakur as Manager of and on behalf of the Bengal Coal Company took a Mokurari settlement of 9 bighas of land in mouza Deoli from the late Hira Chand Gossain the representative of the junior branch of the family, and on the 29th Chaitro 1248 (10th April 1842) he took a settlement of another 49 Bighas in the same mouzah from Hira Chand, and also from Chuni Lall Gossain representing the elder branch. This settlement of the 49 Bighas was confirmed by the plaintiff's predecessors Jiban Lall Gossain, Chandra Mohan Gossain and Modan Mohan Gossain of the elder branch by a deed dated the 4th Pous 1265 B. S., (18th December 1858) (Exhibit 47) and on the 10th Assin 1266 (25th September 1859), Hira Chand Gossain the representative of the younger branch, alleging that he had taken an ijara lease for 28 years of the share of the other branch confirmed to the Bengal Coal Company the settlements previously made of the 49 bighas and of the 9 bighas.

The Bengal Coal Company at first paid the annual rent of the lands included in the two settlements to all the co-sharers, but from 1266 B. S., (1859) they paid the rent to Hira Chand Gossain alone as he had taken the ijara settlement of the 12 annas share (Exhibit 1) of this Mouzah from Madan Mohan Gossain plaintiff No. 1 and Jivan Lal Gossain, father of plaintiff No. 6, for a period of 28 years.

Hira Chand Gossain was thus in possession of the entire 16 annas of this Mouzah, that is four annas in his own right as an heir (through the second wife) of Parmanand Gossain, and 12 annas as an ijaradar from the members of the elder branch represented by Madan Mohan Gossain and Jivan Lall Gossain. The ijara kabuliati was executed on the 15th Baisakh 1269 (27th April 1859) and was for a term running from 1266 up to 1293 B.S. During this period Hira Chand and after him his son Nilmoney held exclusive possession of the entire mouzah. After the expiry of the term in 1293 B. S., the heirs of Hira Chand continued to hold possession by virtue of Karari ijara right from year to year.

In 1903 A. D., there was a Criminal Case under section 145 Criminal Procedure Code in connection with some lands situated in the said mouzah, in which the Malia defendants, the Misra defendants, the Bengal Coal Company and some of the plaintiffs were parties, and during the trial of this case the plaintiffs came to know that in execution of the decree (Execution case No. 157 of 1902) in Civil suit No. 366 of 1892 of the Court of the Subordinate

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Judge of Burdwan, the Malia, and Misra defendants had purchased on the 14th July 1902, a 12 annas share of mouza Deoli described as being held by the late Hira Chand Gossain in putni right, and since their purchase they have set up a claim to possession of the surface and mineral rights, and a right to dig up the minerals from the subsoil.

The plaintiffs allege that neither the late Hira Chand Gossain nor his heirs nor any other person have ever held possession of the said 12 annas share by virtue of any putni or any other permanent or Kayemi right. The late Hira Chand Gossain was in possession of the 12 annas share simply as an ijaradar, as described above, and after his death his heirs cannot claim that any permanent right has accrued to them, and even if they have such a right, they have no right to the subsoil.

Further the said ijara right not being transferable, any transfer by Hira Chand or his heirs without the consent of the plaintiffs, (landlords) cannot operate against them and they are therefore entitled to take khas possession of the said share.

The prayers in the plaint are :—

(a) That the right of the plaintiffs to the 12 annas share may be declared.

(b) That it may be established that the defendants have no right to the surface or subsoil of the said property, and a decree may be awarded to the plaintiffs for khas possession of the same.

(c) That if for want of notice of ejectment khas possession cannot be awarded, it may be established and decreed that the defendants hold a san-karari ijara right from year to year of the said property, and that the plaintiffs may be held entitled to get khas possession on serving such a notice.

(d) That if it be held that the said Defendants have acquired any permanent right in the said share, it may be declared that they have no right to the subsoil, or interest in the same, and a decree may be passed for issuing a permanent injunction restraining the defendants from raising any minerals from the subsoil of the said 12 annas share.

(e) That interest may be awarded with costs.

(f) That a decree may be passed for any other or additional relief that in the Judgment of the Court may appear fit and proper.

The defendant's case is that the plaintiff's suit is barred by the general and special rules of limitation.

That the geneology given in the plaint is not correct.

That the plaintiffs or their predecessors have never been maliks in possession of the disputed share of the mouzah Deoli.

That no settlement was ever made with the Bengal Coal Company either of 9 bighas or 49 bighas as stated in the plaint ; the said company had only a ghat Jamai settlement of a small plot of land which was abandoned by them for a period of more than 12 years, and had therefore become extinct. The said Coal Company have incited the plaintiffs to institute the present suit.

That the late Hira Chand Gossain was in possession of the entire 16 annas of mouzah Deoli by virtue of proprietary right and right by adverse possession.

That, as a proprietor in possession, Hira Chand had granted a permanent settlement of a 12 annas share of this mouzah to the present defendant's predecessor namely Maharanee Hara Sundari Debya by a Pattah dated 23rd Falgoon, 1274 B. S., (5th March 1868) and after the death of Hira Chand his son Nilmoney sold on the 29th Chaitro 1288 B. S., (9th April 1883) a 9 annas share out of his proprietary right in the said mouzah to the said Maharanee, and since the said settlement and purchase the Maharanee has been duly entitled to and in possession of the said 12 annas share.

That the said Hira Chand Gossain had hypothecated his entire right in mouzah Deoli along with other properties on the 23rd Sraban 1286 B. S., (7th August 1879) under a registered usufructuary mortgage deed executed by him in favour of Mr. E. G. Rooke, and that Mr. Rooke after having obtained a decree in suit No. 366 of 1892 on the basis of the said deed took out execution of the same in Execution Case No. 157 of 1892 and sold by auction the mortgaged property ; that the said Maharanee Hara Sundari Debya purchased the said mouzah Deoli on the 14th July 1892 in the name of one Debendra Nath Chatterjee, and subsequently took possession through the Court, and thus became entitled to and was in possession of the entire 16 annas of the said mouzah, and since her death the defendants Nos. 1 and 2 and the Receiver defendants on their behalf, have been in possession of the entire rights and interest of the said mouzah.

The defendants deny that an ijara was granted to Hira Chand and that rent was ever realized by the plaintiffs from the Bengal Coal Company.

Hira Chand Gossain and after his death his son Nilmoney were all along in possession by virtue of a right acquired by

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adverse possession and on the death of Nilmoney, his heir Lakhee Narain Gossain has been holding possession of all the properties. Ramtaran Gossain never got possession of any portion of the estate left by Nilmoney.

The following issues were framed by the lower Court :—

1. Have the plaintiffs any right to sue ?
2. Is the geneology given in the plaint correct ?
3. Is the suit barred by limitation ?
4. Have the plaintiffs their alleged right in the share in dispute and are they entitled to get khas possession thereof ?
5. Are the plaintiffs entitled to the injunction asked for ?

The Subordinate Judge has dismissed the present suit on the ground that the plaintiffs have no right to sue as they are not the legal heirs of Chunni Lal. He disbelieved the pedigree given in the plaint. He also held that the suit was barred by limitation, finding that Hira Chand had exclusive and independent right in the entire mouzah Deoli. He found that it was proved that the defendants had been in possession of the property in dispute since 1868 under their mukarari right as well as under their right by purchase, adversely to the plaintiffs, and their predecessors in title. He was of opinion that Exhibit I, the Ijara Kabuliat purporting to have been executed by Hira Chand in favour of Madan Mohan and Jivan Lal was a very suspicious document and that it did not appear to be genuine. The plaintiffs have appealed.

The appeal has been argued before us at considerable length but its decision appears to depend on the determination of the following points. The correctness of the geneological tree has not been disputed.

1. Is the ijara kabuliat Exhibit I, dated 15th Bysack 1266 (27th April 1859) a genuine document, and was there any renewal of the ijara either expressly or by implication after the expiration of the term of 28 years mentioned in that deed ; and if the period was extended as alleged was it for another 28 years, or from year to year, or was the lessee on the land only on sufferance ?

2. Did Hira Chand hold possession of the 12 as from the first in his own right as an independent proprietor ; or if it be held that the ijara kabuliat is genuine and that he entered into possession at first under that settlement, then, when the term of 28 years for which the settlement was made had expired, did he thereafter hold possession of the 12 annas share adversely to the

plaintiff, and if so, is Art. 139 of the Limitation Act (Act XV of 1877) a bar to the present suit?

The ijara kabuliat Exhibit 1 on which plaintiffs rely is an unregistered document and purports to have been executed by Hira Chand in favour of Madan Mohan and Jivan Lal on the 15th Bysack 1266 B.S. (27th April 1859). Under this document Hira Chand appears to have taken 12 annas of Mouza Deoli in ijara lease admitting that share to be the ancestral Debutter property of Madan Mohan and Jivan Lal. In this deed it is also recited that Hira Chand himself has got only a 4 annas share in that village as his ancestral property. The lease is for a term of 28 years, that is from 1266 to 1293 B.S. (1859 to 1887) at an annual rental of Rupees 199-12. This document being more than 30 years old, the Court may presume its genuineness if it be produced from proper custody (section 90 of the Evidence Act), but the effect of the presumption may be weakened by circumstances which tend to raise doubts as to its authenticity.

In dealing with this document the Subordinate Judge notices that the plaintiff Madan Mohan in whose favour it was executed did not go into the witness box to prove its due execution, nor, if he was ill as alleged, was any attempt made to take his evidence by commission. On comparing the signature which purports to be the signature of Hira Chand on this document, with his admittedly genuine signature on Ex. B he finds that they do not agree, and he is not satisfied that the document was produced from proper custody. He, therefore, finds that it is not genuine.

It is not always safe to rely on a comparison of signatures. On referring to the two which the Subordinate Judge compared we find that there are points of similarity and dissimilarity between them which render it difficult on that ground alone to determine whether the document Ex. 1 is genuine or not. The document was produced by the plaintiff who would naturally be in possession of it, and the Subordinate Judge gives no reasons for his conclusion that the document was not produced from proper custody. There remain, however, to throw suspicion on its genuineness, the circumstance that the evidence of Madan Mohan to prove its execution was not given either in Court or on commission.

On the other hand there is to support its authenticity the fact that in the ijara pattah dated 10th Aswin 1266 B. S. (25th September 1859) executed by Hira Chand in favour of the Coal

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Co. five months after the alleged execution of the Kabuliati, it is distinctly recited that he had taken an ijara lease for 28 years from Jivan Lal Gossain and others, and there is the circumstance that after the execution of the Ekrarnama by Jivan Lal Gossain and others (Ext. 47) on the 4th Pous 1265 (18th December 1858) confirming the lease of the 49 bigahs to the Coal Co. there would have been no necessity for the execution of the lease by Hira Chand in September 1859 if the ijara had not been granted to him in the meantime. The receipts (Exhibits 48, 49, 17, 20, 21, 22, 23) produced by the plaintiff also go to support the case of the plaintiffs that the two shares of 4 annas and 12 annas were treated as held under separate titles by Hira Chand.

There can then be no doubt that an ijara lease of the 12 annas share was in fact taken by Hira Chand in 1859, and that it was for 28 years, and whether the document produced is in fact the kabuliati or not is not very material. On the whole we are inclined to disagree with the Subordinate Judge, and hold that the document is genuine.

There can be no doubt that if Hira Chand entered into possession of the 12 annas share as ijaradar under that lease, he could not acquire any title by adverse possession against his lessors pending the term of the lease unless he distinctly asserted such a title to their knowledge and gave them notice that he asserted such a title.

The first assertion of such a title on his own behalf on which reliance is placed by the respondents is at the time of the Government survey 1863, when he stated in evidence before the survey officer that the whole of village Deoli was granted *kharija debutter* to him by the Maharaja of Chackla Panchkote. At that time however he was, according to the plaintiff's case, in sole possession of the property, and there is nothing to prove that this assertion of his own exclusive title was made with the knowledge of the plaintiffs or that they had any notice that he had set up such a title.

In 1868 by a deed dated the 23rd Falgun 1274 (1868) he granted to Srimati Hara Sundari Debya a dar-mokurari of the 12 annas share in Deoli, alleging that he was a mokuraridar of that share and stating that the Bengal Coal Co. held a ghat pottah only, which was untrue, and on the 23rd Sraban 1286 (7th August 1879) he executed the mortgage deed in favour of Mr. Rooke hypothecating the whole of M. Deoli as security for the debt, and in that deed it was recited that he held 4 annas

as his ancestral property and 12 annas by *butni* right. In these two documents diverse rights were set up and it is not proved that the execution of either was brought to the knowledge of the plaintiffs or they had any notice of the adverse title set up in them. Hira Chand died in 1881 and on the 29th Chaitra 1288 (10th April 1882), Nilmoney the son of Hira Chand executed the deed of sale of 9 annas out of the 12 annas in Deoli and in that deed it was recited that he held it in ancestral Mokarari right.

All these documents were executed before the expiry of the lease, the period of which extended up to 1887, and if the plaintiffs had no knowledge or notice of them or that Hira Chand and Nilmoney were purporting by setting up an adverse title to them to deal with the property covered by the lease as their own, such documents and transactions would not bind the plaintiffs.

Nor would the failure to pay rent to the plaintiff during the period of the lease alone operate to create in favour of the defendants a title by adverse possession (see *Rungo Lall Mundal v. Abdool Guffoor* (1) *Tatia v. Sada Shiv* (2)).

But accepting that the ijara lease for 28 years is valid, and that the acts done and documents executed by Hira Chand, the lessee, and his successor are invalid and ineffectual and cannot be held in law to in any way prejudice or destroy the title of the plaintiffs, there still remains the important question to determine whether after the expiration of the lease in 1886 the defendants have acquired against the plaintiff a title by adverse possession, so that the present suit is barred by Art. 139 schedule II of the limitation Act.

The plaintiff's case is that after the expiry of the term of the lease, the lessee Nilmoney verbally asked to be allowed to hold on for another similar term on the same conditions. The evidence to prove this is however meagre and far from satisfactory. It consists of statements made in his evidence by Jageswar Gossain (P. W. I.) The ijara deed itself contains no stipulation for renewal on the expiry of the lease.

Jageswar Gossain is one of the plaintiffs. His evidence therefore cannot be regarded as disinterested. In his examination-in-chief he deposes to the devolution of the estate of Parmanand in two shares, 12 annas to the elder branch of which he is one of the representatives and 4 annas to the younger branch, and to the grant of the ijara of the 12 annas share by the senior

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(1) (1878) I. L. R. 4 Calc. 314.

(2) (1882) I. L. R. 7 Bom. 40.

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members of the elder branch to Hira Chand who represented the younger branch. He deposes to the grants of the leases of the 49 bighas and 9 bighas to the Bengal Coal Company but says that after the death of Hira Chand the rent for the 9 Bighas was paid to members of the senior branch, which cannot be correct.

As to the receipt of rents from Hira Chand during the ijara, and from the Bengal Coal Company he says in cross-examination that there are counterfoil receipts and jama-kharach. These documents have not however been produced in evidence, and the reason of the omission is not explained.

The following statements bearing on the renewal of the lease made in cross-examination are important. He says: "The ijara to Hira Chand lasted 28 years. I was not present at the time of the ijara. An ijara pottah was executed. Hira Chand used to pay the rent of the ijara. My brother used to realize the rents. He (apparently meaning Hira Chand) paid the rent in my presence. The rent of the ijara was Rs. 199-12. The Searsole Babus (defendants Nos. 1 and 2) are holding possession for 8 or 10 years. Before that Nilmoney held possession. After the death of Nilmoney, Lakhee Narayan and Ramtaran held possession of the said 12 annas. They held for 3 or 4 years. I cannot say why the Searsole Babus are holding possession."

"We did not re-enter on khas possession on the expiration of the ijara. Nilmoney said 'let me have it as at present.' There was no other document executed. Nilmoney was alive when the ijara expired. Nilmoney died 3 or 4 years afterwards. Nilmoney told my elder brother 'let my ijara remain as it is.' I was not present then. I gave Dakhilas on receipt of rent from Nilmoney. I have an account of the same. Nilmoney's nephews (sister's sons) did not pay rent. They said 'we do not at all get rent. We are not sure as to whether the property is in the sea or on land?' They said 'they had not got rents from the Searsole Babus. After the death of Nilmoney the Searsole Babus used to hold possession of the property.' Nilmoney's nephews said 'the Searsole Babus are holding possession. How should we pay rent?' After the death of Nilmoney we have paid no rent to the Rajah of Panchkote. Nilmoney died in 1293 or 94..... After the death of Nilmoney, Lakhee Narayan used to pay rent to the Rajah. After the death of Nilmoney we have not got a pice of rent."

The evidence of this witness as to the renewal of the ijara lease after it had expired in 1293 (1886) is admittedly hearsay,

and, as such, of no value. He also makes the following important admission (1) that the plaintiffs never paid any rent to the Rajah the superior landlord since Nilmony's death which occurred in 1294, (2) that Lakhee Narayan, as sister's son of Nilmoney, has been paying rent to the Rajah and (3) that since Nilmoney's death the plaintiffs have received no rents from Nilmony's heirs or representatives.

For the respondents it has been contended that this conduct on the part of the members of the two branches of the family after the ijara lease had expired clearly indicates that since that time Nilmony the son of Hira Chand and his successors as representing the younger branch of the family have been openly and avowedly holding the 12 annas share as well as their 4 annas in an independent right as proprietors adverse to the rights of the members of the senior branch. And this view it is argued, is supported by the following statements of witness in the concluding part of his evidence :—" After the death of Nilmony we have not got a pice of rent. The daughter's son said he would pay. It was the business of us five co-sharers. We could not procure sufficient funds and therefore we could not bring a suit for rent. Now the Bengal Coal Company are supplying the expenses, a verbal agreement has been made with them that if the property be recovered it will be settled with them." It is suggested that the parties really interested in the suit are the Bengal Coal Company and not the plaintiffs.

In our opinion the evidence adduced by the plaintiffs completely fails to prove that there was a renewal of the ijara lease in 1293 (1887). After it had expired, Nilmony died in 1888. Admittedly since his death the plaintiffs have received no rent from his successors, while his successors have been paying the rent to the superior landlord and openly asserting a right as proprietors to the entire interest in Deoli as well as to the other property left by Parmanand. The present suit was instituted on the 13th July 1904 seventeen years after the death of Nilmony and if limitation be taken to run against the plaintiffs from the date when the lease expired; and if the present suit be regarded as a suit by a landlord to recover possession from a tenant, it is barred by Art 139. Sch. II of the Limitation Act. If it be treated as a suit for possession of immovable property it would equally be barred under Art. 144 of the same schedule if the possession of the successors of Nilmony be held to have been adverse to the plaintiffs.

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For the respondents it has been argued that if it be admitted for the sake of argument that after the expiry of the ijara lease Nilmoney and after him his successors were allowed to hold over, they became tenants on sufferance and the holding over was wrongful (see Woodfall on Landlord and Tenant 17th Edition p. 246) and on the authority of the cases of *Kantheppa Raddi v. Sheshappa and another* (1) and of *Chandri v. Daji Bhan* (2) it has been contended as a tenant by sufferance is only in by the laches of the owner so that there is no privity between them; such a holding over by the tenant is wrongful and the limitation provided by Art. 139 of Schedule II of the Limitation Act commences to run against the landlord from the time when the fixed lease expires. In the case of *Adimulan v. Pir Ravuthan and another* (3), a different view was expressed, but that case was considered and apparently dissented from by the Judges of the Bombay High Court in the case of *Kantheppa v. Sheshappa* (1).

We agree with the view taken by the Judges of the Bombay Court and hold that in the present case if Nilmoney and his successors held over after the expiry of the lease and if no subsequent arrangement was arrived at between them and the plaintiffs as landlords by which a new tenancy was created, limitation must run against the plaintiffs from the date when the lease expired.

Now while the evidence on the record goes to support the case of the defendant respondents that after the expiration of the lease in 1293 (1886) Hira Chand and Nilmoni continued to assert a title adverse to the plaintiffs, which they had advanced during the continuance of the lease, there is no evidence to prove as between the plaintiffs or their predecessors and the defendants and their predecessors Nilmoney and Hira Chand that there was any arrangement by which a new tenancy was created.

On the 23rd Sraban 1286 (7th August 1879) Hira Chand Gossain executed the mortgage bond in favor of Mr. Rooke by which he hypothecated the whole of Deoli with other property as security for the debt. In that document he alleged he had a *putni* right to a 12 annas share and an ancestral right to the 4 annas share in Deoli on the 31st Bysack 1293 (1886) Nilmony the son of Hira Chand executed a fresh mortgage bond in substitution for that executed by his father Hira Chand and on the 16th September 1891 Mr. Rooke brought a suit to recover the money due on the

(1) (1897) I. L. R. 22 Bom. 893.

(2) (1900) I. L. R. 24 Bom. 504.

(3) (1885) I. L. R. 8 Mad 421.

mortgage. He obtained a decree on the 7th April 1892 and in execution of the decree put up mouzah Deoli for sale and it was purchased by Debendra Narayan Chattopadhyaya on behalf of Maharanee Hara Sundari Debi the predecessor in interest of defendants Nos. 3, 4 and 5 otherwise described as the malias or the Searsole Babus. A sale certificate for the same was drawn up on the 18th August 1892 (see Exhibit A23.)

Prior to this on the 23rd Falgun 1274 B. S. (5th March 1868) Hira Chand executed a dar-mokarrari lease in favour of Rani Hara Sundari Debya of the 12 annas share in Deoli and on the 29th Chaitro 1288 (10th April 1882) Nilmony Gossain executed a deed of sale of a 9 annas share out of the same 12 annas share in Deoli in favour of the same lady. In both documents it was recited that he held the 12 annas share as a mukarari tenure. Possession appears to have been taken by the purchaser after that sale and after the sale of the entire mouza in 1892.

In these transactions Hira Chand and Nilmoney acted and were treated as the sole persons intrested in mouza Deoli and the interests of the plaintiffs and their predecessors were openly repudiated on the one side and ignored on the other. It seems impossible that these transactions were all carried out without the members of the elder branch of the family having knowledge of them.

In 1879 the superior landlord sued Hira Chand as the sole tenant for the rent of mouza Deoli, obtained a decree on the 24th August 1879 which was confirmed by the High Court on appeal on the 14th March 1881, Hira Chand having died in the meantime and Nilmoney having been substituted in his place (see Exhibits A30, A32 and A31.)

In 1888 the superior landlord the Raja of Panchkote again brought a suit for the rent of Deoli against Nilmoney, as sole tenant and obtained a decree on the 10th August 1888. Lakhee Narain the sister's son of Nilmoney was substituted by an order of the 23rd June 1888 as a defendant in that suit in place of Nilmoney, who had died while the suit was proceeding. In these proceedings also the rights of the elder branch of the family were ignored (see Exhibits A27 and A33.)

Then in 1896 the manager of the estate of the Raja of Panchkote brought a suit for the rent of Deoli against the defendants Nos. 3 and 4 in the present suit, the heirs of Rani Hara Sundari (and who are described as the malias or the Searsole Babus) as tenants of Deoli for the years 1299 to 1301

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B. S., and obtained a decree on the 23rd November 1896 (Exhibit A28).

In 1902 the manager of the Raj again sued the Searsole Babus for the rent of Deoli and obtained a decree on the 16th December 1902 (Exhibit A29.) In that suit Madan Mohan Gossain as representing the elder branch of the family intervened but afterwards withdrew his objection.

We find then that after 1887, if not before, Deoli was treated as the property of the younger branch of the family of Parmanand and it was not till 1902 that any assertion of the rights of the elder branch was made and then it was not supported.

Not only then was there no fresh agreement between Hira Chand and his successor with members of the elder branch of the family for the creation of a fresh lease of the 12 annas share of Deoli after the original lease had expired, but Hira Chand and his successors were openly setting up a title of their own to the property and were recognized by the landlords as the sole proprietors' tenants. Under such circumstances it is impossible in our opinion to hold that the present suit is not barred by Article 139 of Schedule II of the Limitation Act.

A large number of receipts have been produced in evidence by the plaintiffs and relied on in support of their title. First there are the receipts given by Hira Chand jointly with members of the elder branch of the family for rents received from the Coal Company for the lands leased out to them. These are for the years 1843 to 1850. Next there are three receipts given to Dwarka Nath Tagore since 1858 in which Hira Chand's name does not appear. Then there are the receipts from 1855 to 1890 given to the Coal Company by Hira Chand alone or Mr. Rooke as mortgagee of Hira Chand. From 1890 there is a break and the Coal Company seem to have relinquished the lands which they held, see (Exhibit A24) the plaint in the mortgage suit brought by Mr. Rooke against Lakhee Narayan Gossain, as heir of Nilmoney and Hira Chand.

After a break of ten years the Bengal Coal Company on the 2nd September 1900 recommenced to pay rent but they paid it then to Madan Mohan as heir of Chuni Lal and Hira Chand (Exhibit 105) and three other payments were made on the 4th March 1901, 11th March 1901 and 7th July 1903 (Exhibits 50, 51 and 106.)

These documents cannot however be held to avoid the bar of

limitation. The receipts up to 1890 support the case of the defendants and the payments of rent by the Coal Company from 1900 to Madan Mohan and his branch of the family instead of to the members of the younger branch, as they had been made previously, cannot be accepted as of much value as proving the possession of Madan Mohan, as they appear to have been made after the Coal Company had quarrelled with the Searsole Babus. In fact it would appear that the object of those payments was simply to support the present claim, in which the Coal Company appears to be the persons chiefly interested.

The case for the plaintiffs was that they were not aware till 1903 that Hira Chand and his branch of the family had been alienating and dealing with the 12 annas share of the property in contravention of their interests, and the suit having been instituted on the 13th July 1904 just one day before 12 years had expired from the 14th July 1892 the date of the purchase of mouza Deoli on behalf of Rani Hara Sundari in execution of the decree obtained by Mr. Rooke on his mortgage, it has been contended that the suit is not barred under the general rule of Limitation. On the other side it has been contended that it is impossible to believe that the members of the elder branch were not aware that before the Survey authorities in 1863 Hira Chand set up an exclusive title to the land in suit. That in 1868 he gave a permanent lease of the whole 12 annas to the Searsole Babus, that in 1879 he mortgaged it to Mr. Rooke and in 1882 he sold $\frac{1}{4}$ th of the share to the Searsole Babus especially as the Searsole Babus took possession under their lease and purchase. The subsequent suit brought by Mr. Rooke on his mortgage could not have gone on without their knowledge, and the fact that they brought the suit one day before 12 years had expired from the date of the sale in execution of the decree in that mortgage suit leaves no doubt that they were aware of the suit and of the decree. We find it very difficult to believe that all these transactions which were carried on openly could have been conducted without the knowledge of the plaintiffs or their predecessors in interest.

The estate appears to have been partitioned between the 12 annas and the 4 annas co-sharers in 1201 B. S. (1795-6) and after that partition the two shares were separate. It would appear however, after the execution of the ijara lease in 1858 by the elder branch in favour of Hira Chand, that complete control over all the family property was handed over to him,

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and in his subsequent dealings with the property he dealt with the whole of it as his property even though in different documents he described his interest in different terms. During all that time the plaintiffs never attempted to assert their rights, nor indeed do they appear to have recognized that they had any rights in the property. It was only when the Bengal Coal Company had failed to obtain from the Searsole Babus a settlement which they wanted that the present plaintiffs were put forward to assert a title which had long before been barred by limitation.

The plaintiffs having lost all title to the property in suit they cannot now be held to retain any rights to the subsoil minerals.

The result is that we confirm the judgment and decree of the lower Court and dismiss the appeal with costs.

A. T. M.

Appeal dismissed.

CIVIL RULE.

Before Mr. Justice Stephen and Mr. Justice Mookerjee.

CHAIRMAN OF GIRIDIH MUNICIPALITY

v.

SREESH CHANDRA MAZUMDAR.*

Bengal Municipal Act (III of 1884), Secs. 85, (87d), 92, 113, 114 and 116—Assessment of a holding—Assessment, if ultra vires—Assessment, legality of, if may be questioned in a Civil Court—Civil Court, jurisdiction of—Principle of assessment—"Circumstances and property," meaning of—

Section 116 of the Bengal Municipal Act (III of 1884), does not take away the jurisdiction of the Civil Courts in a case in which it is alleged and established that the assessment, the propriety of which is in controversy, is open to objection on the ground that it is *ultra vires*; in other words, it is only when the action of the Municipality has been exercised in conformity with the powers conferred upon it by the Act, that the Civil Court has no authority to interfere. The test in such cases is, whether the assessment is or is not in conformity with the statutory provisions.

Navadip Chandra Pal v. Premananda Saha (1), *Kameshwar Pershad v. Chairman of Bhabna Municipality* (2), and *Nundolal Bose v. The Corporation of Calcutta* (3) followed.

Rea v. Moreley (4), *Rea v. Plowright* (5), *Ex. Bradlaugh* (6), *Rea v. Bradley* (7) and *Colonial Bank of Australasia v. Willan* (8) referred to.

Errors in assessment which constitute irregularities merely and do not go to the ground work of the tax and render the assessment void, can be corrected only in the manner provided by the statute which creates the authority, and the remedy so provided must be treated as exclusive. On the other hand, where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies, and all clear violations of law give rise to jurisdictional questions. In other words, while mere erroneous exercise of judgment is not reviewable by the Civil Court, any excess of jurisdiction, makes the act liable to challenge in such Court.

State v. Williams (9), *Hacker v. Howe* (10), *Douglas v. Stone* (11) and *Stanley v. Albany* (12) referred to.

The term "*property*" designated as a subject of taxation without any qualification includes both real and personal property or estate and intangible as well as tangible rights of value.

Carroll v. Perry (13) applied.

* Civil Rule No. 3053 of 1907, against a decision of Dr. Vipin Chandra Roy, Munsiff of Giridih, exercising the powers of a Small Cause Court Judge, dated 17 August 1907.

(1) (1898) 3 C. W. N. 73.

(2) (1900) I. L. R. 27 Calc. 849.

(3) (1885) I. L. R. 11 Calc. 275.

(4) (1760) 2 Burr. 1041.

(5) (1685) 3 Mod. Rep. 95.

(6) (1878) 3 Q. B. D. 509.

(7) (1893) 17 Cox. 739.

(8) (1874) L. R. 5 P. C. 417.

(9) (1904) 123 Wis. 61; 100 N. W. 1048.

(10) (1904) 101 N. W. 255.

(11) (1903) 191 U. S. 557.

(12) (1886) 121 U. S. 535.

(13) (1848) 4 McLean 25.

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The word "*circumstances*" was not introduced in section 85 of the Act, to restrict the term "property"; the intention of the Legislature seems to have been on the other hand, to widen the scope of the section, so as to make taxable what might perhaps be not properly comprised under the term "*property*" and at the same time ought not to escape assessment. The property of the defendant which was taxable, in the present case, under the law, was unquestionably his whole income, and the fact that he spent only half of it within the Municipality does not make his circumstances and property within the Municipality worth only that much.

Rule obtained by the Plaintiff, Chairman of the Giridih Municipality, under section 25 of the Small Cause Courts Act.

Suit for recovery of the taxes due in respect of the first two quarters of the year 1905-6 for a holding occupied by the Defendant.

The facts of the case appear fully from the judgments.

Babu Hara Prasad Chatterjee for the Petitioner.

Babu Baikuntha Nath Das for the Opposite party.

C. A. V.

April, 7.

The judgments of the Court were as follows:

Stephen J.—This is a curious and important case turning on the proper construction of section 85 of Bengal Municipal Act. The case was tried by the Small Cause Court Judge of Giridih. The plaintiff was the Chairman of the Giridih Municipality, the defendant a Deputy Magistrate engaged on Land Acquisition Work and having his head quarters and living at Giridih. His salary was Rs. 300 a month, of which he spent 150 on the maintenance of his family and like expenses, including the payment of premiums on a life policy, outside the boundaries of the municipality. He occupied one house as an office and another chiefly as a residence. An assessment was made on the owner of the houses based on their rental. This was withdrawn on objection being made. But the defendant was assessed on his full income of Rs. 300 a month at 1 per cent or Rs. 9 a quarter. His contention was that the assessment on him personally ought to be on Rs. 150 only, the amount which he may be taken to have spent in the municipality. The Judge agreed with this view and gave judgment accordingly. A rule has been granted to show cause why the decree should not be set aside and the plaintiff's claim allowed in full.

It has been suggested before us on behalf of the petitioner that the present question is merely the amount of the assessment that has been made, and that under section 116 this is not

a matter that can be dealt with by a Civil Court. It is hardly necessary to discuss the contention in view of the decisions in *Navadip Chandra Pal v. Furnananda Shaha* (1), and *Kameshwar Pershad v. Chairman of the Bhabna Municipality* (2), where it is laid down that a remedy may be sought in a Civil Court against an action of a Municipality that is *ultra vires*, and that the taxation of a man in respect of property and circumstances outside the jurisdiction of the municipality is *ultra vires*. The principle is well recognised in English law, cf. *Nundo Lal Bose v. Corporation of Calcutta* (3) and a derogation from it by the legislature is not to be lightly inferred. I am therefore of opinion that the Munsiff had jurisdiction to deal with this case in which the jurisdiction of the Corporation of Giridih to tax the plaintiff in respect of certain property was called in question, and therefore of course we can exercise our revisionary jurisdiction over his decision.

On the merits then what we have to decide is the meaning of section 85 (a) of the Municipal Act. The section empowers (a) the Commissioners to impose "a tax upon persons occupying holdings within the municipality according to their circumstances and property within the municipality" and the question argued before us turns on the meaning to be attached to the words "circumstances and property." Is it the case that as far as the plaintiff's income is used as a test of his circumstances and a measure of his property only that part of his income is to be considered which he spends in the municipality? Shortly, is he to be taxed on what he gets or on what he spends in the municipality? The question seems to be one of first impression as no authorities have been quoted before us nor are we aware of any. The case of *Kameshwar Pershad v. Chairman of the Bhabna Municipality* (2) was decided on this section; but the decision does not touch the present point. It has been suggested that section 87 (d) may throw light on the subject, where it is enacted that a list is to be drawn up showing an assessee's holding, property and profession or business, and this may show that his holding and profession or business are his circumstances, but this brings us no nearer to the solution of the present question, as the question is how much of his circumstances connected with his business is within the municipality.

On the words themselves his "property" seems to mean

(1) (1898) 3 G. W. N. 72.

(2) (1900) I. L. R. 27 Calc. 849.

(3) (1885) 1 I. L. R. 11 Calc. 275.

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movable and immovable property in the widest sense and to include certainly any salary that he receives in the municipality, without any deductions on account of his manner of spending it. Does the word "circumstances" coupled as it is with property, cut down this meaning or extend it? For it must do one or the other, otherwise the phrase would be a mere pleonasm. If the word circumstances is to be taken as limiting the scope of the word property, we must attach to it the meaning that it has in such a phrase as "easy circumstances," meaning the whole of his position in life from an economical point of view. It then becomes necessary to consider all his expenses and liabilities, and allowance must be made for debts and possibly for improvident habits. This may lead us a good deal beyond the bounds of the municipality, and I find it impossible to suppose that it can have been intended that matters such as these should form a basis of taxation. On the other hand, it may very well be that "property" does not include all a man's wealth and that it is at nothing less than his total wealth that this section is aimed. Are voluntary offerings to a priest property? I should imagine not. But their regular receipt would surely be included in a man's circumstances, although they may not for that reason only be a proper subject for a tax. Other states of fact may easily be supposed where a man's resources extend beyond his property: and the word circumstances is apt for describing them. Taking the word in this sense, it offers in conjunction with "property" a fairly definite basis for taxation. It has been argued that it cannot have been intended by this Act to impose a second income-tax. I do not think this has been done, as from the point of view I suggest the tax provided by section 85(a) is not only an income-tax, but something else besides. I have at least no doubt that the defendant in the case now before us is liable to pay a tax on all the salary he receives in Giridih, however virtuously, or otherwise he may see fit to spend it.

The rule is, therefore, made absolute, but without costs.

Mookerjee J.—The circumstances of the present case in which we are invited to exercise our revisional powers in favour of the plaintiff under section 25 of the Provincial Small Cause Courts Act, raise a question of some novelty and importance. The plaintiff is the Chairman of the Giridih Municipality which was established on the 1st January 1902 and the powers of which are regulated by the Bengal Municipal Act (III of 1884). The defendant is a Deputy Magistrate employed by Government in

Land Acquisition Work. He occupies a holding within the Municipal limits and as a rate-payer was under section 85 clause (a) of the Bengal Municipal Act assessed with an annual tax of Rs. 36 payable in four equal quarterly instalments. The defendant took exception to the assessment under section 113, but his application was summarily dismissed by the Municipal authorities without recourse to the procedure laid down in section 114. He declined, however, to pay the sum assessed and the present action was commenced on behalf of the municipality for the recovery of the taxes due in respect of the first two quarters of the year 1905-6. The claim was resisted substantially on the ground that the assessment was *ultra vires*, that the Municipality had no jurisdiction to assess the tax with reference to the salary earned by the defendant, *viz.*, Rs. 300 a month, and that the proper basis of assessment was the sum spent by the defendant within the limits of the Municipality which he alleged amounted to Rs. 150 a month. In reply it was contended on behalf of the Municipality that as an application for review presented by the defendant had been rejected under section 114, the assessment has become final under section 116, that its legality could not be questioned either directly or collaterally before the Civil Court and that consequently the plaintiff was entitled to a decree for the entire sum claimed. The Small Cause Court Judge overruled the preliminary objection taken on behalf of the plaintiff and upon the merits decided in favour of the defendants. The Rule now under consideration was thereupon issued by this Court at the instance of the plaintiff and the learned vakil who appears in support of it has called in question the propriety of the order of the Court below on two grounds, *viz.*, *first*, that it was not competent to the Court below and is consequently not competent to this Court to question the legality of the assessment and *secondly*, that upon the merits, the assessment ought to be treated as made in conformity with the provisions of section 85 of the Bengal Municipal Act.

As regards the first of these objections, reliance is placed by the learned vakil for the petitioner upon section 116 of the Bengal Municipal Act which provides that no objection shall be taken to any assessment or rate in any other manner than in this Act is provided. It is contended that a remedy by recourse to a regular suit in the Civil Court for cancellation of the assessment or by way of a proper defence to an action by the Municipality in the Civil Court for recovery of assessed taxes is not

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expressly mentioned as a possible mode of objection in any portion of the Act, nor is such a remedy, it is asserted, contemplated by the legislature. In my opinion, this contention is not well-founded upon principle and is not supported by any authority. The effect of the provisions of section 116 was considered by this Court in the cases of *Navadip Chandra Pal v. Purnananda Saha* (1) and *Kameshwar Pershad v. Chairman of Bhabna Municipality* (2). In these cases it was pointed out that section 116 does not take away the jurisdiction of the Civil Courts in a case in which it is alleged and established that the assessment the propriety of which is in controversy is open to objection on the ground that it is *ultra vires*, in other words, it is only when the action of the Municipality has been exercised in conformity with the powers conferred upon it by the Act, that the Civil Court has no authority to interfere. The distinction is obviously well-founded on principle. A Corporation, which is invested with authority to assess taxes, is really invested with a quasi judicial power, and although its action, when taken in conformity with the provisions of the law which created the authority, may not be liable to challenge in the Civil Courts, it does not enjoy a similar immunity when that action can be challenged on the ground that it has been taken either in excess of or in contravention of the powers conferred upon it by the statute. An analogous view has been taken by the other Indian High Courts with reference to other statutory provisions of similar scope and import. Reference may usefully be made to the decision of the Madras High Court in *Municipal Council of Cocanada v. The Standard Life Assurance Company* (3) where the previous decisions were reviewed, as also to the decisions of the Bombay High Court in *Municipality of Wai v. Krishnaji Gangadhar* (4), *Morar v. Borsad Town Municipality* (5) and *Kasandas Raghunathdas v. The Anklesvar Municipality* (6). The true test is whether there has been a substantial disregard of the provisions of the law which creates the authority of the Municipality and regulates its powers and duties. As my learned brother has already pointed out, a similar view had been taken by this Court in *Nundo Lal Bose v. The Corporation of Calcutta* (7) in which Sir Richard Garth, C. J. relied in support of this position

(1) (1898) 3 C. W. N. 73.

(2) (1900) I. L. R. 27 Calc. 849.

(3) (1900) I. L. R. 24 Mad. 205.

(4) (1898) I. L. R. 23 Bom. 446.

(5) (1900) I. L. R. 24 Bom. 677.

(6) (1901) I. L. R. 26 Bom. 294.

(7) (1885) I. L. R. 11 Calc. 275.

upon the principle deducible from the cases of *Rex v. Moreley* (1) and *Rex v. Plowright* (2), which shew that the distinction recognised between a case in which the Corporation has acted within its powers but probably exercised an erroneous discretion and another in which the Corporation has acted in contravention of its powers, is analogous to the distinction between an error of fact and an error of law. To put the matter in a different way, the Civil Court is not called upon to try the merits of the question but to see whether the authorities possessed of limited jurisdiction have exceeded their bounds. A similar view has been taken in the English Courts in more recent cases, [*Ex. Bradlaugh* (3) and *Reg. v. Bradley* (4)] and the provisions of section 220 of the Municipal Corporations Act of 1882 (45-46 Victoria Chap. 50) have been similarly interpreted. The principle applicable to cases of this description was elaborately examined by their Lordships of the Judicial Committee in *Colonial Bank of Australasia v. Willan* (5), where it was pointed out by Sir James Colville that the Court would have jurisdiction to interfere and quash the order of the quasi-judicial authority upon the ground either of a manifest defect of jurisdiction in the tribunal that made the order or of manifest fraud in the party procuring it. It was also ruled that objection on the ground of defect of jurisdiction may be founded on the character and constitution of the Court, or on the nature of the subject-matter of enquiry, or on the absence of some preliminary proceeding which was necessary to give the jurisdiction to that tribunal. But the objection of defect of jurisdiction cannot be entertained if it rests solely on the ground that the tribunal has erroneously found a fact which was essential to the validity of the order and which it was competent to try. That the distinction which the learned vakil for the petitioner invites us to ignore is well established on principle, is further obvious from the fact that it is recognised not only in our system of law but in other systems of jurisprudence; for instance, it is universally recognised in American Courts. It has been repeatedly ruled that errors in assessment which constitute irregularities merely and do not go to the ground-work of the tax and render the assessment void, can be corrected only in the manner provided by the statute which creates the authority, and the remedy so provided must be treated as exclusive. On the other hand, where the defects in assessment are jurisdictional, rendering them

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(1) (1760) 2 Burr. 1041.

(2) (1685) 3 Mod. Rep. 95.

(3) (1878) 3 Q. B. D. 509.

(4) (1893) 17 Cox. 789.

(5) (1874) L. R. 5 P. C. 417.

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void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies, and all clear violations of law give rise to jurisdictional questions. In other words, while mere erroneous exercise of judgment is not reviewable by the Civil Court, any excess of jurisdiction makes the act liable to challenge in such Court. [*State v. Williams* (1), *Hacker v. Howe* (2), *Douglas v. Stone* (3), *Stanley v. Albany* (4).] It was argued, however, by the learned vakil for the petitioner, as had been argued on behalf of the plaintiff in the Court below, that even if we assume that it was open to the defendant to obtain a declaration in a suit properly framed that the assessment was illegal, it is not open to him to raise the question by way of defence to an action for recovery of the tax. No authority was shewn in support of this position and I am unable to hold that it is based upon any intelligible principle. The test is, as I have pointed out, whether the assessment is or is not in conformity with the statutory provisions. If it is not it does not enjoy any security from collateral attack. If the assessment is open to objection on the ground of lack of jurisdiction which, be it remembered, has to be exercised in conformity with the statute, it is open to collateral attack. *Muir v. Bardstow* (5). The essence of the matter is that the action of the municipality is in its nature quasi-judicial and is not subject to collateral attack except upon the ground of fraud actual or constructive, or on the ground of exercise of power not conferred by the statute. If errors or irregularities are committed, they must be corrected in the mode appointed by the statute and if not so corrected, they become conclusive, for Courts have not the power to control the quasi-judicial authority in a matter of discretion. But when the assessment proceeding is in clear violation of the provision of the statute, the Court has jurisdiction to afford relief. It follows consequently that the first ground upon which the decision of the Court below is challenged on behalf of the plaintiff cannot be sustained.

The second ground upon which the decision of the Small Cause Court Judge is impugned raises an important question as to the scope and meaning of section 85 of the Bengal Municipal Act. That section authorises the Commissioners of a Municipality to impose within its territorial limits taxes upon persons occupying holdings within the Municipality "according to their circum-

(1) (1904) 123 Wis. 61; 100 N. W. 1048 (1904). (3) (1903) 191 U. S. 557.

(2) (1904) 101 N. W. 255.

(4) (1886) 121 U. S. 535.

(5) (1906) 87 S. W. 1096.

stances and property within the municipality." The question raised is as to the precise effect of the phrase "circumstances and property" which is not defined in the Act. So far as we can make out, the question is one of first impression and our attention has not been invited to any decided cases which have any direct bearing upon the matter now in controversy. As I have already stated, the defendant earns a salary of Rs. 300 a month within the limits of the municipality. But he urges that he spends within the jurisdiction of the municipality only half of that sum and the other half he spends outside the municipality for the maintenance of his family, for payment of premiums for Life Insurance and expenses of a like character. It is contended on his behalf that his circumstances and property within the municipality are indicated and measured by the amount which he spends within its territorial limits. After careful consideration of the arguments addressed to us on both sides, I am unable to treat this contention as well founded. The term "property" designated as a subject of taxation without any qualification obviously includes both real and personal property or estate and intangible as well as tangible rights of value. [*Carroll v. Perry* (1)]. No doubt the word 'property' in any particular case, must receive a construction in accordance with the context. There can be no question I think that if section 85 mentioned property within the municipality and nothing else, the whole of the income earned by the defendant would be assessable under the law. The question, therefore, resolves itself into this, *viz.*, whether reference to the circumstances of the rate-payer within the municipality does, in effect restrict and narrow down what is indicated by property within municipality. I am unable to see that it has any such alleged effect. If any such effect was intended by the Legislature, the phraseology might have been appropriately made different, and one would expect that if the test intended was, not what is earned, but what is spent, the Statute would have expressly so provided. In the same way, if it was intended that a deduction should be made either for the expenses of the rate-payer or for his indebtedness or for possible insolvency, the exemption would probably have appeared on the face of the Statute. On the other hand, if we look to section 92 of the Bengal Municipal Act we find that "circumstances" is used as equivalent to 'means' which indeed is given in the Oxford Dictionary, Vol. 2, page 435, as one of the

(1) (1845), 4 Mc. Lean 25.

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ordinary significations of the term; "circumstances" is defined as "condition or state, as to material welfare or means." I am unable to hold, therefore, that the word "circumstances" was introduced in section 85 to restrict the term 'property.' The intention on the other hand seems to have been to widen the scope of the section so as to make taxable what might perhaps be not properly comprised under the term 'property' and at the same time ought not to escape assessment. I feel no doubt in this particular case that the property of the defendant which was taxable under the law was unquestionably worth Rs. 300 a month and that the fact that he spent only half of it within the municipality does not make his circumstances and property within the municipality worth only that sum of money. It follows consequently that the assessment made by the Commissioners was in conformity with the law and that it cannot be successfully challenged on the ground that it was in excess of their powers or had been based upon a principle contrary to that recognized by the statute. The view taken by the learned Small Cause Court Judge is clearly erroneous, and I agree with my learned brother that this Rule must be made absolute and the decree of the Court below modified.

Under the circumstances no order need be made for costs.

Rule made absolute.

APPELLATE CIVIL.

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1907.

January, 30, 31.

February, 7.

Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.

RAMJAN MAHOMED AND OTHERS

v.

CHUNDER MOHAN ADITYA.*

Limitation—Possession, suit for—Mortgagee purchaser—Formal possession—Period from which limitation runs—Third person in actual possession—Ouster.

In execution of a mortgage decree the mortgagees purchased the property under mortgage on the 7th October 1888 and took formal possession of it on the 17th February 1890. The plaintiff who bought the property from the auction-purchaser brought a suit for possession on the 20th December 1901 against the mortgagor and his vendees, who were not parties to the mortgage suit.

Held, that the suit was barred by limitation as the cause of action accrued when the mortgage security ceased on the 7th October 1888.

Brojo Nath v. Khelut Chunder (1) followed.

* Appeal from Appellate Decree No. 135 of 1904, against the decree of Babu Kali Prosonno Roy, Additional Subordinate Judge of Sylhet, dated the 31st October 1903, affirming that of Babu Behari Lal Chatterjee, Munsiff of Karimganj, dated the 24th November 1902.

(1) (1871) 16 W. R. 83 P. O.

In the case of a third person who had already purchased the property and obtained actual possession, delivery of possession as against the judgment-debtor alone, cannot amount to an ouster of the person in possession.

Narain Das v. Lalla Prosad (1) followed.†

Mussammatt Dhapi v. Barham Deo (2) distinguished.

Appeal by Defendants Nos. 3, 5 and 6.

Suit for possession with mesne profits.

The facts of the case and argument appear sufficiently from the judgment.

Babus Tarak Chunder Chakravati and Brojo Lal Chakravati for the Appellants.

Babu Jadu Nath Kanjilal for the Respondent.

The judgment of the Court was as follows:—

This litigation involves the rights *inter se* of the purchasers under a mortgage decree and the assignees of the mortgagor who were not made parties to the mortgagee's suit. The plaintiff derives his title from the purchasers-mortgagees, the defendants Nos. 3, 5, 6, claim from the mortgagor. Both the Courts below have given the plaintiff a decree for possession of the lands in suit together with mesne profits. Defendants Nos. 3, 5, 6, appeal and on their behalf it has been contended, *first*, that the suit is barred by the twelve years rule of limitation; *secondly*, that it is bad for defect of necessary parties; *thirdly*, that at any rate there should have been a proper decree for redemption; and *fourthly*, that these defendants are not liable for mesne profits.

In the year 1884 the defendant No. 1 executed a mortgage of his four annas share in a certain mehal in favour of the vendors of the plaintiff. The defendant No. 1 then executed a second mortgage of the same lands in favour of one Ram Mohan Aditya. In the following year, 1885, the same mortgagor sold his four annas share, along with another like share belonging to defendant No. 12 whose guardian he was, to the defendants Nos. 3, 5, 6, and some of the other defendants or their predecessors, by six different conveyances. We may observe, in passing, that one of the questions in this appeal is whether the defendants Nos. 3, 5, 6, obtained possession in pursuance of their purchase. Then, in the year 1887, the vendors of the plaintiff instituted a suit on their mortgage against the defendant No. 1 and some of the purchasers, but without making the defendants Nos. 3, 5, 6 parties to the

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(1) (1899) I. L. R. 21 All, 269.

[† See *Mir Waziruddin v. Lala Dooki Nandan* 6 C. L. J. 472 at 483—Rep.]

(2) (1899) 4 C. W. N. 297.

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suit, and obtained a decree on the 3rd March 1888, in execution of which the mortgagees sold up the mortgaged property which they themselves purchased, on the 7th October 1888, and took formal possession of, on the 17th February 1890. After this, on the 5th July 1891, the plaintiff bought the property from the auction purchasers. But, meanwhile, on the 18th February 1890, that is to say, one day after the formal delivery of possession to the plaintiff's vendors in their execution sale, the second mortgagee, Ram Mohan Aditya, who had obtained a decree against the mortgagor defendant No. 1 only, took possession of the same property whereby the first mortgagees were ousted after twenty-four hours. There followed a case under section 332 of the Code of Civil Procedure which resulted, in favour of Ram Mohan Aditya, on the 18th April 1890, and it was not until more than one year had elapsed that the first mortgagees sold to the plaintiff.

On the question of limitation the only point for consideration is whether plaintiff is entitled to reckon time from the 17th February 1890; if he is not, his suit instituted on the 20th December 1901, is clearly barred. For the defendants Nos. 3, 5, 6, the appellants in this Court, it is urged that limitation must be counted from the 3rd March 1888 the date of the decree obtained by plaintiff's vendors on their mortgage or from the 7th October 1888 the date of their purchase at the auction sale.

We think that, on the findings arrived at by the lower appellate Court, the possession taken by plaintiff's vendors on the 17th February 1890, was merely symbolical: they failed to get actual possession and, therefore, sold their rights, involving this litigation, to the plaintiff. The term "ouster" used by the Subordinate Judge undoubtedly means "ouster in law" and not "ouster in fact."

The pleadings of the parties, and the conclusions arrived at in the Courts below, also, lead to the inference that the defendants Nos. 3, 5, 6, were in actual possession of the lands in suit from the date of their purchase from the mortgagor in 1885: it is on this footing that they have been made liable for *wasilat*.

On these facts can it be said that the plaintiff's possession originated within twelve years next before suit so as to defeat the title by adverse possession set up by the defendants Nos. 3, 5, 6?

It has been contended before us, by the learned vakil for the defendants Nos. 3, 5, 6, on the authority of the Privy Council decision in *Brojonath Koondoo Chowdhry v. Khelut Chunder Ghose* (1), that when the mortgage security came to an end by

the proceedings had in the year 1888, time began to run as against the mortgagees. Their Lordships observed: "The foreclosure proceedings did not affect the defendant or the property in question and it is difficult to see how a right of entry or cause of action against one man in respect of his property could be either lost or gained by proceedings against another man in respect of his property." We think this contention is sound, and, in this view of the matter, plaintiff's cause of action accrued when the mortgage security ceased on the 7th October 1888 owing to the purchase, made by his vendors the mortgagees, of the right of redemption. So, also, in another case, (*Narain Das v. Lalta Prasad* (1)), it was pointed out that "in the case of a third person who had already purchased the property and obtained actual possession, delivery of possession, as against the judgment debtor alone, cannot amount to an ouster of the person in possession." Now, there can be no doubt that the defendants Nos. 3, 5, 6, were third parties, for they were not affected by the decree obtained against the mortgagor and other purchasers from the mortgagor, and they were in possession of certain lands with an equity of redemption against which no superior equity was created by the purchase made by the mortgagees.

The learned vakil on both sides have, also, called our attention to the decision of this Court (Rampini and Pratt JJ.) in *Mussamut Dhapi v. Barham Deo Pershad* (2), where the learned Judges held that "the symbolical possession obtained by the plaintiffs was effective against the mortgagor and was obtained within 12 years of the institution of the suit." That is a proposition beyond dispute. But it appears from the report (page 303) that the plaintiffs' possession was prior in point of time to that of the defendants: there, the plaintiffs purchased and took symbolical possession before the defendants purchased or took possession. The authority of the case we have cited is, therefore, in favour of the present appellants.

Upon the facts found, and we are unable to disturb those facts in second appeal, we are constrained to hold that the plaintiff's suit is barred by the twelve years rule of limitation. It is not necessary to decide the other contentions raised before us.

The appeal is allowed. Plaintiff's suit is dismissed with costs in all the Courts.

A. T. M.

Appeal allowed.

(1) (1899) I. L. R. 21 All 269.

(2) (1899) 4 C. W. N. 297.

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March, 8.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

PARSIDH NARAIN SINGH AND OTHERS

v.

JANKI SINGH AND ANOTHER.*

Hindu Law, Mitakshara—Joint Hindu family—Co-parcener when joint alienating—Mortgagee, right of—Partition—Mitoppel.

During the subsistence of co-parcenership, a co-parcener in a joint Hindu family governed by the Mitakshara law cannot alienate his own share of the family property.

Sadabart Prosad v. Foolbask (1) followed.

On the severance of the family by the decree in a partition suit, the mortgage which was in the nature of an inchoate right became perfected as regards the share of the mortgagor.

Mahabeer Persad v. Ramyad Singh (2) and *Jamuna Persad v. Ganga Pershad* (3) referred to.

Semble : The co-parceners A and B who purchased the interest of another co-parcener C under the money decree obtained in a partition suit with full knowledge of the mortgage in favour of the plaintiff by C are estopped from contesting the right the plaintiff had.

Lala Parbhu Lal v. J. Mylne (4) dissented from.

Appeal by the Defendants.

Suit for realisation of mortgage debt by sale of the mortgaged property.

The facts of the case and argument appear sufficiently from the judgment.

Dr. Rash Behary Ghose and Babus Mahendra Nath Roy and Biraj Mohun Mojumdar for the Appellants.

Babus Golap Chunder Sarkar, Umakali Mukerji and Jogendra Chunder Ghose for the Respondents.

The judgment of the Court was as follows :

The defendants Nos. 1, 2 and 3 formed members of a joint family governed by the Mitakshara system of the Hindu Law. The defendant No. 1 was an adult member while the other two defendants were minors when on the 26th May 1893, the minors through their next friend instituted a suit for partition of the joint family property, for appointment of a Receiver and for other reliefs. On the 24th September 1894, the defendant No. 1 mortgaged his share of the family property to the plaintiffs.

* Appeal from Appellate Decree No. 1508 of 1904, against the decree of C. E. Pittar, Esq., District Judge of Gaya, dated the 13th February 1904, affirming that of Babu Purna Chandra Roy, Subordinate Judge of Gaya, 2nd Court, dated the 9th March 1903.

(1) (1869) 3 B. L. R. 31 (F. B.)

(2) (1873) 12 B. L. R. 90.

(3) (1892) I. L. R. 19 Calc. 401.

(4) (1887) I. L. R. 14 Calc. 401.

The mortgage and the passing of the consideration have been proved in the present suit which is one for the realisation of the mortgage debt by sale of the mortgaged properties.

The suit instituted by the defendants Nos. 2 and 3 against the defendant No. 1 proceeded very tardily. On the 1st November 1894, a Receiver was appointed of the family property and the so-called *kartaship* of the defendant No. 1 was taken away. A decree was made in the partition suit on the 26th February 1896 and the result of the decree, so far as the status of the family was concerned, was that the members of the family ceased to have joint interest in the family property and so the co-parcenership of the different members came to an end. On the 26th February 1896, after the pronouncement of the decree for partition, each co-parcener could say what his share in the family property was. The severance, for all purposes of the Hindu Law, was complete, though there was no division by metes and bounds until later on.

The defendants Nos. 2 and 3 obtained in the suit a money decree against the defendant No. 1 and, in execution of that decree, they caused the sale, amongst others, of the shares of the family property mortgaged by the defendant No. 1 to the plaintiffs. They themselves with others became purchaser on the 22nd February 1902. The present suit was instituted on the 29th August 1902, and the mortgagor was arrayed as defendant No. 1, his brothers, the defendants Nos. 2 and 3, and all the other persons interested in the mortgaged properties, were made parties according to the provisions contained in section 89 of the Transfer of Property Act.

The main contest in the suit was raised by the defendants Nos. 2 and 3, and they said that the mortgage to the plaintiff was in its inception bad inasmuch as the defendant No. 1 could not, on the 24th September 1894, as the family still was, in the eye of law, joint, mortgage his undivided interest in the family property. There can be no doubt that, on the authorities, this contention is correct. The case of *Sadabart Prasad Sahu v. Foolbash Koer* (1) lays down that, during the subsistence of co-parcenership, a co-parcener in a joint Hindu family governed by the Mitakshara law cannot alienate his own share of the family property because he cannot predicate what his own share is. This decision has been accepted as correct law, so far as the Upper Provinces of India are concerned, by the Judicial

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Committee in the case of *Deendyal Lal v. Jugdeep Narain Singh* (1).

If there had been no subsequent partition, it would have been impossible for the plaintiffs to enforce their mortgage by a suit against the joint family property. But, in our opinion, the decree in the suit for partition, changed the aspect of affairs. Though, in 1894, the mortgagor defendant could not give a valid title by a mortgage to the plaintiffs, of his own undivided share of the family property, the decree in the partition suit enabled the plaintiffs to fall back on their mortgage and to derive all the benefits that they could have derived if the family had been divided at the date of the mortgage. The principle is now well established that, if a person alienates property of another person a property which he cannot alienate, and if, subsequently, the person who alienates obtains a title to the property, the person in whose favour the alienation has already been made may derive the benefit of the title which the person alienating obtains subsequently. This is the principle of section 43 of the Transfer of Property Act, and it has been acted upon in the cases of *Mahabbeer Pershad v. Ramyad Singh* (2) and *Jamuna Pershad v. Ganga Pershad Singh* (3). Both these cases are cases under the Mitakshara law, and it has been held that, though a mortgage could not be good as long as the family was joint, the severance of the family enured to the benefit of the mortgagee. We are of opinion that the same principle applies to the present case and, that, on the severance of the family by the decree in the partition suit, the mortgage which was in the nature of an inchoate right became perfected as regards the share of the defendant No. 1.

In the view that we take of the right of the plaintiffs as regards their mortgage, it is not necessary for us to discuss the other question which has been argued before us, namely, the question of estoppel, on which the judgment of the lower appellate Court is partially based. But we may intimate it as our view that the doctrine of estoppel fully applies to the facts of the present case. The lower appellate Court has found that the defendants Nos. 2 and 3 purchased the interest of the defendant No. 1 under their money decree with full knowledge of the mortgage in favour of the plaintiffs. They themselves instituted the partition suit and they derived benefit under the

(1) (1877) I. L. R. 3 Calc. 198.

(2) (1873) 12 B. L. R. 90.

(3) (1892) I. L. R. 19 Calc. 401.

decree obtained in it. They caused the sale of a share when the mortgage was subsisting, and notwithstanding that the plaintiffs had merely an equitable right, the defendants by their action are estopped from contesting the right that the plaintiffs had.

Our attention has been drawn to the case of *Lala Parbhu Lal v. J. Mylne* (1) but the correctness of this decision must now be doubted, having regard to the decision of the Judicial Committee in the case of *Mohamed Mozuffer Hossain v. Kishori Mohun Roy* (2) and the observations of the learned Judges of the Court in the case of *Ishan Chandra Sirkar v. Beni Madhub Sirkar* (3). In the latter case the Court said :—"On the other hand, in the recent case of *Mohamed Muzuffer Hossein v. Kishori Mohun Roy* (2) their Lordships of the Privy Council have held that the equitable principle of estoppel laid down in the case of *Ram Coomar Koondoo v. McQueen* (4) which applies to any person is equally binding on the purchaser of his right, title and interest at a sale in execution of a decree."

Both, therefore, on the ground that the plaintiffs had acquired a right to proceed on their mortgage on the partition effected between the members of the joint family, and on the ground that the defendants were estopped from pleading their own right as superseding the right of the plaintiffs, we are of opinion that the suit of the plaintiffs has been rightly decreed and that the decree of the lower appellate Court must be affirmed. The appeal is accordingly dismissed with costs.

A. T. M.

Appeal dismissed.

(1) (1887) I. L. R. 14 Calc. 401.

(3) (1896) I. L. R. 24 Calc. 62,

(2) (1895) I. L. R. 22 Calc. 909.

(4) (1872) 11 B. L. R. 46.

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Parsidh Narain
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r.
Janki Singh.

*Before Sir Francis W. Maclean, K. C. I. E., Chief Justice and
Mr. Justice Coxe.*

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January, 20, 21.

FARMAN BIBI AND ANOTHER

v.

TASHA HADDAL HOSSEIN.*

*Landlord and tenant, denial of relation—Waiver—Plea of dispossession by
third person, if renunciation of relation—Section 111 of Transfer of
Property Act—Onus.*

Where, after the denial of his title by the tenant, the landlord received rent, he can not rely upon the denial as a ground of forfeiture.

It is not a renunciation of his character as lessee under the lease when sticking to his character as lessee he said that inasmuch as he could not get possession of some land within the lease in respect of which he set up the right of a third person and as he could get no satisfaction from his lessor, he had to make the best terms he could with the third person in order to prevent him from turning him out of the land.

Where after the execution of the *hebanama*, the basis of the plaintiffs' title, the grantors of the *hebanama* executed leases in favor of the defendants, the fact that the defendants paid rent to the plaintiffs does not make the plaintiffs the defendants' lessors.

It is upon the plaintiffs to make out that the lessee has renounced his character as such by setting up a title in third person or by claiming title in himself.

Semle.—Section 111 of the Transfer of Property Act deals with the whole lease of the immovable property comprised therein and not with a part or moiety of it. The section has no application where there is no renunciation by one of the two lessees.

Quære.—Whether or not the institution of the suit itself to evict the tenant is an act by the lessor showing his intention to determine the lease or whether there must be act done by him showing such intention prior to the institution of the suit.

Appeal by the Plaintiffs.

Suit for khas possession on the ground that the defendant who was one of the tenants of the land has forfeited his interest by denying the plaintiffs' title as landlord.

The facts of the case and argument appear sufficiently from the judgment.

Babu Harendra Narayan Mitter for the Appellants.

Dr. Rash Behary Ghose and Moulvi Mahammad Mustafa Khan for the Respondent.

The judgment of the Court was as follows :

Maclean C. J.—This is a suit for *khas* possession of certain

* Appeal from Appellate Decree No. 44 of 1906, against the decree of *Babu Srigopal Chatterji*, Subordinate Judge of Dacca, dated the 1st September 1905, reversing that of *Babu Mohim Chandra Chakravati*, Munsiff of Naraingunge, dated the 27th July 1904.

land, on the ground that the defendant as one of the tenants of the land has forfeited his interest by denying the plaintiffs' title as landlord and that the lease has determined under sub-section (g) of section 111 of the Transfer of Property Act.

The Munsiff decreed the suit, and the Subordinate Judge has dismissed it with costs, on the ground that the lessee has not renounced his character as such either by setting up a title in a third person or by claiming title in himself. The plaintiffs have appealed.

We must take the facts as found by the lower appellate Court. It appears that the lease in question was granted by two persons of the name Lakhu and Mohabut, on the 18th of Falgun 1293. It was a *mourasi mokararee pottah*, and the defendant with his brother who was a co-lessee and who is since dead but whose heirs are not parties to this suit, executed a *kabulyat* corresponding to the *pottah*, in favour of Lakhu and Mohabut. It appears that at any rate in the years 1892 and 1893, *dakhillas* were granted to the defendant and they purported to have been given on behalf of Lakhu and Mohabut and not on behalf of the plaintiffs. The plaintiff's claim under a *hebanama* dated the 20th of Magh 1292, which was a year or so in date prior to that of the lease to which I have referred. The plaintiff's rights under the *hebanama* are not very clear: but the Subordinate Judge finds that "even if the plaintiff's really obtained any rights under the *hebanama*, they allowed their grantors" (that is to say Lakhu and Mohabut) "still to exercise the right of ownership by granting registered *pottah* to tenant and by realising rent from him. So by their conduct the plaintiffs induced the defendant to believe that they had acquired no right." It appears, however, that the plaintiffs brought two rent-suits in the years 1891 and 1895, against both the tenants under the above lease, and recovered rent. In those suits the defendants set up that as regards a part of the property some 10 cottas, they had never been able to obtain possession of it and that in consequence they had to execute a registered *kabulyat* in favour of a certain Municipality which claimed to be entitled to these 10 cottas, and paid rent to it. It is suggested that in those rent-suits the present defendant denied the title of the plaintiffs. But it has been very properly conceded that inasmuch as after those rent suits assuming the plaintiffs to be the defendant's landlords they received rent, they cannot rely upon that denial as a ground of forfeiture; in 1901, the present plaintiffs again brought a suit, apparently

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against the present defendant only, claiming an injunction : and, in that suit the defence was, unfortunately the defence is not before us and I am taking it from the finding of the Subordinate Judge, that the plaintiff's *hebanama* was fraudulent and collusive and that the plaintiff's had acquired no right under it, and that the defendant was not a tenant-at-will, as the plaintiffs had set up in that suit, but a permanent lease-holder under Lakhu and Mahabut ; and that the defendant had been unable to obtain possession of 10 cottas out of the land leased to him by Lakhu and Mahabut as the Government had acquired it and subsequently sold it to the Naraingunj Municipality and the defendant was obliged to take a fresh lease from the said Municipality. The finding of the Subordinate Judge as regards the 10 cottas in respect of which the defendant set up the right of the Municipality is that "the evidence which is on the record shows satisfactorily that the defendant failed to obtain possession of the 10 cottas and informed Lakhu of the fact, but Lakhu did not stir and finally the defendant executed a registered *kabulyat* in favour of the municipality and has been paying rent to it." There are other findings of the Subordinate Judge which are material for the purpose of the present decision. The Judge says "I have shown that the plaintiffs by their conduct induced the defendant to believe that they are mere *benamdars* of Lakhu and Mohabut and that the defendant had very solid reasons for saying all he said regarding the 10 cottas in question and that his defence in the injunction suit was a substantially true one and made in good faith." He goes on to say "In none of the three suits the defendant renounced his character as lessee. On the contrary, he stuck to the registered *potta* (H) granted by the plaintiffs' grantors, throughout. The plaintiffs, on the other hand, received rent from him up to 1305." "The defence," says the Judge, "in the injunction suit was the same defence as was made in the second rent suits and the plaintiffs waived the forfeiture alleged, to have accrued on the defendant's denial in these suits. The fact seems to be that the defendant never refused to pay rent to Lakhu and Mohabat, though he has been obliged to take a fresh lease under the Municipality for the 10 cottas which had been acquired by the Government." And he finds that "as the defendant has improved the land which has become valuable, they (the plaintiffs) are harassing the defendant to compel him to give up the land." Those are the facts upon which we have to come to our conclusion.

The first point is that the lessors of the defendant are Lakhu and Mahabut, whatever the arrangements may have been between them and the plaintiffs. The defendant has never renounced his character as their lessee. All he did and all he said was that inasmuch as he could not get possession of the 10 cottas in respect of which he set up the right of the Municipality, and as he could get no satisfaction from his lessors, he had to make the best terms he could with the Municipality in order to prevent them from turning him of the land, the 10 cottas. That is not a renunciation of his character as lessee under the lease. The finding is, as I have said, that he stuck to the registered *pottah* and that has been his case throughout. Is this then a case of forfeiture? Although in the two suits to which reference has been made, the defendants paid rent to the plaintiffs and in that sense the latter may have been recognised by the former for the purpose of those suits as their lessors in point of strictness and of fact they are not and never were the lessors of the defendant nor are they transferees from the lessors; for the *hebanama* under which they claim was executed sometime before the lease in question.

Then there is another difficulty in the plaintiffs path: There were two lessees one of them is dead and his interest passed to his heirs but they are not parties to the suit. It is not suggested that they have renounced their character as lessees. How then can section 111 apply? The section deals with the whole lease of the immoveable property comprised therein and not with a part or moiety of it. The words are "a lease of immoveable property"; that means the lease in its entirety. There has been no renunciation by the other lessee; I doubt in these circumstances if the section can apply. At any rate, the heirs not having been made parties to the suit, this question can not be determined in their absence.

It is upon the plaintiffs to make out that the lessee has renounced his character as such by setting up a title in third person or by claiming title in himself. The finding of the lower Court is that he had done nothing of the sort. The finding is that far from repudiating the lease the defendant, as I have said, stuck to the registered lease. If so, the plaintiff's claim to relief being based upon this alleged forfeiture and no such forfeiture in my opinion having taken place, the suit fails and the decision of the Subordinate Judge was right.

I may add that it is unnecessary to go into the question as to

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which there seems to be some difference of judicial opinion in this Court, namely, as to whether or not the institution of the suit itself to evict the tenant is an act by the lessor showing his intention to determine the lease or whether there must be act done by him showing such intention prior to the institution of the suit. In the view we take of the case, that question does not arise.

The appeal dismissed with costs.

Coxe J.—I agree.

A. T. M.

Appeal dismissed.

Before Mr. Justice Rampini and Mr. Justice Sharfuddin.

MAHARAJ BAHADUR SINGH AND OTHERS

v.

A. H. FORBES AND OTHERS.*

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March, 25,

April, 8.

Landlord parting with his interest after the accrual of rent, if has a first charge—Decree, character of—Putni Regulation (VIII of 1819), Sec. 13, cl. (4)—Durputnidar's lien, if superior to landlord's charge—Bengal Tenancy Act (VIII of 1885), Sec. 165.

There is nothing in the law which disentitles a landlord to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zemindari.

Nagendra Nath v. Bhuban Mohun (1) considered.

The character of the decree a suitor obtains depends on the nature of the claim, and of his right to the relief sought for and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue.

Hem Chunder v. Monmohini (2) and *Srimant v. Mahadev* (3) not followed.

A *durputnidar* in possession of *putni* under section 13 cl. (4) of the Putni Regulation has only a lien, not a first charge, on the *putni*.

A landlord, who, though after the accrual of the rent sued for, parted with his interest in the zemindari, has a priority over a person having a lien under section 13, cl. (4) of the Putni Regulation and can under section 165 of the Bengal Tenancy Act sell it free of all encumbrances.

Appeal by the Defendants First Party.

Suit by the *durputnidar* for a declaration that a certain *putni* taluk is not liable to be sold in execution of a decree.

* Appeal from Original Decree No. 476 of 1906, against the decree of Babu Surjanarain Das, Subordinate Judge of Purnea, dated the 14th September 1906.

(1) (1901) 6 C. W. N. 91.

(2) (1894) 3 C. W. N. 604.

(3) (1904) I L. R. 31 Calc. 550.

The facts of the case and argument appear sufficiently from the judgment.

Mr. Hill and Babus Promotho Nath Sen and Ram Chunder Mojumdar for the Appellants.

Dr. Rash Behary Ghose and Babus Golap Chunder Sarkar, Dwarka Nath Mitter and Moulvi Mahammad Mustafa Khan for the Respondent.

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The judgment of the Court was as follows :

This appeal arises out of a suit brought by the plaintiff, Mr. A. H. Forbes, who is a *darputnidar*, to have it declared that a certain *putni* taluk formerly held by one Chattrapat Singh, and of which the plaintiff has been put in possession under the provisions of section 13 (4) Reg. VIII of 1819 is not liable to be sold in execution of a decree dated the 10th July 1896, obtained by the former zemindar, Rai Dhanpat Singh, against the *putnidar* Chattrapat Singh, for arrears of rent of the *putni*. The defendants 1, 2, 3, and 4, are the trustees of the estate of Rai Dhanpat Singh. They are described as the defendants first party. The defendant second party is Chattrapat Singh, the former *putnidar*, and the defendant 3rd party Babu Surendra Narain Singh is a purchaser of the *putni* of Chattrapat Singh in execution of a money decree obtained against him.

The facts are fully set forth in the judgment of the Subordinate Judge. They may be noticed here very briefly. It is sufficient to say that the former zemindar Rai Dhanpat Singh obtained the decree for rent, which the defendants 1st party now seek to execute, on the 10th July 1896. The decree was obtained against Chattrapat Singh, the *putnidar*, for arrears of rent of the *putni*. But on the 27th June 1893, Rai Dhanpat Singh has sold his right and interest in the zemindari to Mussamut Bhagwanbati Chowdhurani, so that when he obtained the decree of the 10th July 1896, he was not the zemindar. On the 19th July 1896, Rai Dhanpat Singh executed a deed of trust in favour of the defendants 1st party. Among other properties he assigned to them the decree of the 10th July 1896. In 1897, the trustees applied for execution of the decree of the 10th July 1896 against Chattrapat Singh which was refused. The case went in appeal to the High Court, and this Court overruled the objection of Chattrapat Singh to the execution of the decree in a judgment reported at *Chattrapat Singh v. Gopi Chand Bothra* (1).

(1) (1899) I. L. R. 26 Calc. 750.

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The zemindar Bhagwanbati Chowdhurani then instituted proceedings under Reg. VIII of 1819 for the arrears of the *putni* rent which had then accrued due. The *putni* was advertized for sale on the 14th May 1900; Mr. Forbes, the plaintiff, deposited the *putni* rent under section 13 of the Regulation. He was accordingly put in possession of the *putni* and undoubtedly under section 13 cl. (4) he has a lien on the *putni* for the sum so deposited by him. After this, the defendant 3rd party Surendra Narain Singh on the first September 1902 purchased the *putni* at a sale held in execution of a money decree.

The defendants 1st party then endeavoured to execute the decree of the 10th July 1896. They advertized the *putni* for sale under section 165 of the Bengal Tenancy Act. The plaintiff, Mr. Forbes, on the 10th November 1904 preferred a claim, which was disallowed, because the claim sections of the Civil Procedure Code have no application to execution proceeding under the Bengal Tenancy Act. He made an unsuccessful application to this Court and is accordingly now driven to this suit, which he has brought to have it declared that the *putni* cannot be sold in execution of the decree of the 10th July 1896.

The Subordinate Judge has decreed his suit on the grounds (1) that the decree of the 10th July 1896 is not a decree which can be executed under the provisions of the Bengal Tenancy Act, and (2) that the plaintiff by depositing the *putni* rent has a first charge on the *putni*, and that the defendant first party cannot sell the *putni* free from his first charge.

The defendants appeal and urge that the Subordinate Judge's decision is wrong on both points.

The first and most important question is whether the decree of the 10th July 1896 is or is not a decree that can be executed under the provisions of the Bengal Tenancy Act. It is certainly a decree for arrears of rent of the *putni*, which is a permanent tenure. Therefore, under the provisions of section 65 of the Bengal Tenancy Act the holder of this decree has "a first charge" on the *putni* for the amount of this decree. There are two grounds on which this conclusion is contested (1) that the defendants 1st party are assignees of the decree and consequently under section 148 (h) of the Bengal Tenancy Act are not entitled to execute it, (2) that at the time when the decree of the 10th July 1896 was passed, the zemindar had parted with his right in the zemindari.

The first of these objections has already been overruled by

the judgment of this Court in this case reported at *Chatrapai Singh v. Gopi Chand Bothra* (1) in which it has been held that the word "assignee," as used in section 148 (h) of the Bengal Tenancy Act does not include trustees who execute decrees under an assignment, which is not for their own benefit but for the benefit of the heir of the assignor. We cannot now re-open this question. So far as this Court is concerned, it has been finally decided against the plaintiff.

The second objection to the execution of the decree is supported by the reference to the English law of landlord and tenant which in our opinion cannot override the provisions of section 65 of the Bengal Tenancy Act. According to that section rent is "a first charge" on the tenure or holding liable for the rent. The decree of the 10th July 1896 is a decree for rent. Rai Dhanpat Singh was the landlord at the time when the rent he sued for accrued due. His claim for rent, when found due, became "a first charge" on the *putni*. There is nothing in the law which disentitled him to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zemindari.

Three cases have been cited in opposition to this view *viz.*, *Nagendra Nath Bose v. Bhuban Mohan Chakrabarti* (2), *Hem Chunder Bhunjo v. Mon Mohini Dassi* (3), and *Srimant Roy v. Mahadeo Mahata* (4). We have been asked, if we disagree with these rulings, to refer the questions raised in them to the decision of a Full Bench. In the case of *Nagendra Nath Bose v. Bhuban Mohan Chakrabarti* (2), the landlord had obtained a decree for rent at a time when he had parted with his interest as landlord. The decree he obtained was assigned by him to a third person, who could not execute it owing to the provisions of section 148 (h). The decree was, therefore, re-assigned to the original decree-holder. It was objected that the decree could not be executed by him, as he held as an assignee, but this objection was overruled. This decision would seem to be correct. In any case, the facts are perfectly different from those of the present. The learned pleader for the respondent, however, contends that the reason given in that case for holding that the execution of the decree should proceed was that when the landlord had obtained his decree he had parted with his interest as landlord and so his decree was a money decree. This would appear to be so. A better reason would probably have been that as the decree had

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(3) (1894) 3 C. W. N. 604.

(2) (1901) 6 C. W. N. 91.

(4) (1904) I. L. R. 31 Calc. 550.

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been re-assigned to the landlord, the provisions of clause (h) of section 148 Bengal Tenancy Act no longer prevented execution. Be this as it may, as one of the members of the present Bench was a member of the Bench that decided *Nogendra Nath Bose v. Bhuban Mohan Chakravarti* (1), we may confidently observe that it was never intended in that case to lay down any general rule that a landlord, who has parted with his interest as landlord, can not obtain a rent decree for the arrears of rent of previous years and that no such general rule was laid down or could be laid down which could only be done by legislative enactment. Then, as regards the case of *Hem Chunder Bhunjo v. Mon Mohini Dassi* (2), which was followed in *Srimant Roy v. Mohadeo Mahata* (3), it is to be observed that its correctness formed the subject of consideration in the Full Bench reference *Khetra Pal Singh v. Krithartho Moyi Dasi* (4). In this Full Bench case, it was unanimously held that if at a time, when a suit for arrears of rent is instituted and a decree is made, the plaintiff is still the landlord, the fact that he has subsequently sold his interest in the property does not prevent him from obtaining the benefit of section 65 of the Bengal Tenancy Act and executing his decree against it. In his judgment in this case, the learned Chief Justice has said: "If the decision in the case of *Hem Chunder Bhunjo v. Mon Mohini Dasi* (2), is, as it apparently is, opposed to this view, then I respectfully dissent from it." The other learned Judges who formed the Bench agreed with his Lordship the Chief Justice. Now, no doubt the decision of the Full Bench does not deal with a case such as the present in which the landlord had parted with his interest before he instituted his suit for rent, but it would seem to follow that if he can execute a decree for arrears of rent as a rent decree after he has parted with his interest as landlord, he can also do so when he obtained his decree for rent, even after he had parted with his interest in the property. The character of the decree a suitor obtains depends on the nature of the claim, and of his right to the relief sought for and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue. Hence, the case of *Hem Chunder Bhunjo v. Mon Mohini Dassi* (2) can no longer be considered an authority, or any obstacle in the way of the present appellants. As the learned pleader for the respondent candidly admits, though the decision in *Hem Chunder Bhunjo v.*

(1) (1901) 6 C. W. N. 91.

(2) (1894) 3 C. W. N. 604.

(3) (1904) I. L. R. 31 Calc. 550.

(4) (1907) I. L. R. 33 Calc. 566.

Mon Mohini Dassi (1) may not have been completely demolished, very little of it remains. That being so, if *Hem Chunder Bhunjo v. Mon Mohini Dassi* (1) is no longer an authority, neither is *Srimant Roy v. Mohadeo Mahata* (2), which followed it. We, therefore, do not consider that we are bound by the three above-mentioned cases cited by the respondent, nor that there is any question which we need refer to the decision of another Full Bench.

The next question is when the decree of the 10th July 1896 is a rent decree and can be executed as such, what right has the plaintiff to the injunction he seeks for? He seems to have none. The *putni* has now been put up for sale under the provisions of section 165 Bengal Tenancy Act. The plaintiff, as *darputnidar* in possession, has only "a lien", not a first charge, on the *putni*. The defendants appellants have first charge, on the *putni*. Their decree is entitled to priority over the plaintiff's lien, when they sell it, under section 165 Bengal Tenancy Act they sell it free of all incumbrances. The plaintiff's lien which is not a registered and notified incumbrance, as defined in section 161 of the Act is destroyed even if he has one. The Subordinate Judge finds, on the plaintiff's own evidence, that he has still a subsisting lien, because he says he has not yet recovered from the usufruct the amount he paid to stop the sale. He produces no accounts, as he should have done. It may be doubted then, whether his lien still subsists or not but, even if it does, the *putni* can clearly now be sold free of his lien. The plaintiff has, therefore, no right to the injunction he prays for.

We accordingly decree this appeal with costs.

A. T. M.

Appeal allowed.

(1) (1894) 3 C. W. N. 604.

(2) (1904) I. L. R. 31 Calc. 550.

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August, 9, 12, 21.

Succession Certificate Act (VII of 1889) section 4—Debt, meaning of—section 90 of the Transfer of Property Act (IV of 1882), application under, for money decree—Debt when a crues duo—Applicant plaintiff—Execution of decree—Nature of joint family debt if to appear on the face of the bond—Joint family debt.

In a legal sense a debt is either a liquidated money demand or a liquidated sum due.

Section 4 of the Succession Certificate Act is mandatory. If the matter of non-production of Succession Certificate is brought to the notice of the Court in time, it is the duty of the Court to stay its hand and to give effect to the clear legislative intent.

The amount in respect of which a personal decree under section 90 of the Transfer of Property Act is sought is a debt within the meaning of section 4 of the Succession Certificate Act. It accrued due on the date for repayment mentioned in the mortgage bond. It is not a case of a succession opening out during the pendency of the proceedings in Court, but a case between plaintiff and defendant.

It is not necessary that the debt claimed should appear on the face of the bond that it is a joint family debt; it is enough, if it is admitted or proved that the family is joint. If the debt is a family debt and such a debt has vested by right of survivorship no succession certificate need be produced.

Bissen Chand v. Chatterpat (1), Beiraj v. Bhairo Prosad (2), Patteshwari v. Bhagwati (3), Vithal v. Gatyia (4) and Pallam Raju v. Bapanna (5) referred to.

Appeal by the Decree-holder.

Application under section 90 of the Transfer of Property Act for a personal decree against the judgment-debtor.

The facts and arguments appear sufficiently from the judgment.

Babu Dwarka Nath Mitter for the Appellants.

Moulvi Mahammad Mustafa Khan for the Respondent.

C. A. V.

The judgment of the Court was delivered by

Mookerjee J.—On the 19th September 1895, the defendant, respondent, executed a mortgage bond in favour of one Sakli Sukul, now represented by his sons the appellants. In 1901, the

* Appeal from Appellate Decree No. 2649 of 1905, against the decree of E. Pantou Esq, District Judge of Saran, dated the 29th June 1905, reversing that of Moulvi Ali Ahmed, Munsif of Saran, dated the 8th April 1905.

(1) (1895) 1 C. W. N. 32.

(3) (1895) 1 L. R. 17 All 578.

(2) (1896) 1 L. R. 23 Cal. 912.

(4) (1899) 1 Bom. L. R. 197.

(5) (1899) 1 L. R. 22 Mad. 380.

mortgagee sued to enforce the security against the mortgagor and other persons who had meanwhile acquired an interest in different fragments of the equity of redemption. On the 30th April 1902, the usual mortgage decree was made in favour of the plaintiff, mortgagee. Subsequently the plaintiff died, and his sons, the present appellants made an application for order absolute. Their names were substituted in the mortgage decree which was made absolute on the 6th January, 1904. The mortgaged properties were then sold at their instance, and the sale proceeds were applied in partial satisfaction of the decree. On the 23rd December, 1904, they applied to the Court for a decree against the mortgagor for the balance of the amount still due on the mortgage. Objection was taken on behalf of the mortgagor that no decree could be made in favour of the applicants until they obtained a certificate under the Succession Certificate Act. The Court of first instance overruled this objection and passed a decree in favour of the applicants under section 90 of the Transfer of Property Act. Upon appeal the learned District Judge reversed this decision.

The applicants have now appealed to this Court, and on their behalf, it has been contended, that the provisions of section 4 of the Succession Certificate Act, are inapplicable for five reasons; namely, *first*, that the amount in respect of which a personal decree is sought is not a debt, because, it was indefinite and unliquidated at the time of the death of the creditor; *secondly*, that if it is a debt, it was not due to the deceased, but accrued due to the applicants after the mortgaged properties had been exhausted and the sale proceeds had been found insufficient; *thirdly*, that the succession opened out during the pendency of proceedings in Court; *fourthly*, that as the title of the applicants is not disputed, there is no necessity for the production of a certificate; and *fifthly*, that as the applicants were members of a joint Hindu family with their father, governed by the Mitakshara law, the right to realise the debt has vested in them by survivorship and not in virtue of inheritance. It has also been contended that an opportunity ought to have been afforded to them to produce a succession certificate, if one is required by law.

In support of the first branch of his contention, the learned vakil for the appellant placed reliance upon the cases of *Bisseswar Roy v. Durgadas Mehara* (1), *Subbanna v. Munekka* (2), and *Sabju Sahib v. Noordin Sahib* (3). These cases are authorities for the

(1) (1905) I. L. R. 32 Calc. 418. (2) (1894) I. L. R. 18 Mad. 457.

(3) (1898) I. L. R. 22 Mad. 139.

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proposition that a liability, which is not in respect of a liquidated sum, cannot be held to be a debt in the ordinary accepted legal sense of the term. In this view of the matter, it was ruled in the first and third cases, that a suit for account by a principal against an agent or by one member of a firm against another for account of partnership assets is not a suit for a debt within the meaning of section 4 of the Succession Certificate Act. These cases, however, are obviously distinguishable. Here the demand of the plaintiff, mortgagee, is for a sum certain. It is in every sense of the word an ascertained debt, founded on an express contract, and not an unliquidated demand or liability. No doubt, the sum recoverable by the mortgagee from the mortgagor personally does not admit of specification till the mortgaged properties have been exhausted, and the debt satisfied in part, but that only shows not that the claim of the mortgagee is in respect of an unliquidated sum, but that his remedies for the recovery thereof are in the first instance restricted. To recover his debt, he must first proceed to sell the mortgaged properties, and it is only when the sale proceeds are insufficient to satisfy his demand, that he is at liberty to proceed personally against his debtor. The cases of *Haridas v. Baroda Kishore* (1) and *Dambar Koeri v. Shamkisssen* (2) do not in any way militate against this view, because here the debt is an actually existing debt and not merely a contingent debt which might or might not become due. The distinction is between a liquidated money demand (*Rawley v. Rawley* (3) and unliquidated damages, for instance, damages for tort or for breach of covenant. *Wilson v. Kinubley* (4). In the case before us, the action is founded on an express contract in which, to use the language of Bacon's Abridgment, the certainty of the sum or duty appears, and "the plaintiff is to recover the same *in numero*, and not to be repaired in damages as in those actions sounding in damages." *Watson v. McNairy* (5), *Baum v. Tonkin* (6). From this point of view, it appears to us to be clear that the claim is in respect of a debt within the meaning of section 4 of the Succession Certificate Act. The first branch of the contention of the appellant consequently fails.

In support of the second branch of the contention of the appellant reliance was placed upon the case of *Nemdhari v. Bissessari Kumari* (7), in which it was ruled that the Succession

(1) (1899) 1 L. R. 27 Calc. 38

(2) (1906) 9 C. W. N. 703.

(3) (1876) 1 Q. B. D. 460.

(4) (1806) 7 East 12 8.

(5) (1809) 1 Bibb (4 Ky) 365.

(6) (1885) 110 Penn. 569; 1 Atlantic 545.

(7) (1898) 2 C. W. N. 591.

Certificate Act refers only to debts upon which the deceased could sue, and that, consequently, a debt which had accrued due since the death of the deceased was not a debt in respect of which a certificate need be produced. This principle has obviously no application to a case like the present. Here the whole debt accrued due on the 29th March 1896 the date for repayment mentioned in the bond. It may be conceded, that the creditor was bound in the first instance to seek a particular remedy for the satisfaction of his claim, but nevertheless the debt was all the while in existence and in full vigour. There is no foundation for the assumption that the debt came into existence or accrued due for the first time, when the sale proceeds proved insufficient to satisfy the mortgage decree. One test appears to us to be conclusive. If a question arises as to whether the personal remedy is barred by limitation, with reference to what point of time is the matter to be determined? It was ruled by this Court in *Purna Chandra Mandal v. Radha Nath Das* (1) and *Rahamat Karim v. Abdul Karim* (2), that when an application is made under section 90 of the Transfer of Property Act for a supplemental decree, the court has to consider, whether the personal remedy was barred by the rule of 6 years at the date of the institution of the suit. This view, which is identical with that taken in the case of *In re Barkar's claim* (3) is manifestly inconsistent with the theory, that the debt accrued due after the sale of the mortgaged properties. To use the language of Lord Herschell, in the case just mentioned, "the right of realization as against the debtor personally did not give a separate and independent cause of action; the truth is, that the debt is one debt only." In other words, as Lord Justice Lindley puts it, "the promise to pay the deficiency does not create a new obligation to pay; it only applies the old obligation to a reduced sum; the realization of the security does not add to the cause of action; the cause of action accrued long before." It follows, therefore, that in the case before us, the debt, which the creditor seeks to enforce, accrued due during the life time of the creditor. The second part of the contention of the appellant, also, fails.

In support of the third head of the contention for the appellant, allusion was made to a *dictum* of the learned Judges, who decided the case of *Baid Nath v. Shamanand* (4) and to the decision of this Court in *Mahomed Yusuff v. Abdur Rahim* (5). In the former

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(1) (1906) 4 C. L. J. 141.

(3) (1894) 3 Ch. 290.

(2) (1907) 6 C. L. J. 119.

(4) (1894) 1 L. R. 22 Cal. 143.

(5) (1899) 1 L. R. 23 Cal. 839; 4 C. W. N. 558.

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of these cases, it was observed, that it is extremely doubtful whether the Legislature ever intended that section 4 of the Succession Certificate Act should apply not only to a case where a person claims to recover money under the title of succession to the original creditor, but also to a case, whereupon the death of that person, during the pendency of the suit, some other person is substituted in his place as plaintiff in the cause. In the second case, which turned upon the construction of clause (b) of section 4, sub-section (1), it was ruled, that when an application for execution had been made by the judgment creditor himself, and upon his death, his legal representative applied for leave to continue the execution proceedings, it was not necessary for the latter to produce a certificate. It is not necessary for our present purposes to examine, whether these views may not be open to criticism, and whether they are not too broadly formulated. [See *Vasquez v. Praggi Hurji* (1), where Farran J. undoubtedly assumed, that upon death of the plaintiff, *pendente lite*, though the suit might be continued by his representative, a certificate in proof of his representative title must be produced, before a decree could be made.] It is sufficient to point out, that the cases cited are distinguishable. The present case turns upon the construction of clause (a) of section 4, sub-section (1), which prevents a Court from passing a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person. The appellants are undoubtedly persons of this description, and they seek a decree against the debtor of their deceased father in respect of a debt due to him. No doubt, the claim was included in the plaint by which the action was commenced, but the claim has not yet been investigated, and the application under section 90 is substantially one for a supplemental decree. As was pointed out by this Court in *Purna Chandra v. Radha Nath* (2), the object of section 90 is to obviate the necessity for a fresh suit, possibly in a Court, different from that which passed the decree for sale; the proceedings founded on an application under section 90 are a continuation of the original suit; the relationship of decree-holder and judgment-debtor created by the decree for sale is no longer of any benefit to the decree-holder, and the parties are, therefore, again practically relegated to the position of plaintiff and defendant. In this view of the matter, it is

(1) (1892) I. L. R. 16 Bom. 519.

(2) (1906) 4 C. L. J. 141 (147); I. L. R. 33 Calc. 867.

difficult to appreciate, upon what intelligible principle, a case of this description should be excluded from the operation of clause (a) of section 4, sub-section (1), the terms of which are undoubtedly comprehensive enough to cover the case. In our opinion, the third part of the contention for the appellant cannot be sustained.

The fourth head of contention for the appellant is, that, as shown by the Preamble to the Act, its object is to oppose protection to parties, paying debts to representatives of deceased persons, and, as the appellants were substituted in the place of their father in the decree for sale, they ought not to be called upon to produce a succession certificate. In our opinion, there is no force in this contention. No doubt, according to the decision of this Court in the cases of *Kanchan Modi v. Baij Nath Singh* (1), and *Baid Nath v. Shamanund* (2), the representatives of a mortgagee, seeking relief against the mortgage property alone, need not take out a certificate under the Act, on the ground, that such a suit is not for the recovery of the debt but for recovery of an interest in immovable property. It was consequently possible for the appellants to obtain an order absolute for sale of the mortgaged property; but this fact does not lead to the inference, that they are equally entitled to the balance of the mortgage money; it is quite conceivable that the owner of the mortgage money might have made provision for the disposition of his estate so as to leave the immovable property to one person and the money to another. No doubt, in the view taken by this Court of the scope of section 4, the debtor is not entitled to any protection, so far as the sale of the land itself is concerned, but so far as the personal remedy is concerned, the law gives him protection, and there is no reason why he should be deprived of it. Besides, there is no admission by the respondent, that the appellants are the persons entitled to the personal decree. But even if there were such an admission, the Court could not ignore the mandatory provisions of section 4. In such a case, if the matter is brought to the notice of the Court in time, it is the duty of the Court to stay its hand and to give effect to the clear legislative intent. See *Santaji v. Raoji* (3), where it was held by Sir Charles Sargent C. J. that a certificate was necessary even in the case of a decree by consent. It was pointed out, that the Succession Certificate Act of 1889 is meant to facilitate collections of debts by affording proof of representative title, and

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(1) (1892) I. L. R. 19 Calc. 336. (2) (1894) I. L. R. 22 Calc. 143.
(3) (1890) I. L. R. 15 Bom. 105.

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also for the protection of the revenue, and this is clear from the provisions of section 14. It is not necessary to consider, therefore, whether the principle of waiver would apply ; if the object of the Act was not merely protection to the debtor, the provisions clearly, could not be waived by him. [See *Asutosh Sikdar v. Behari Lal Kirtunia* (1),]. We must consequently hold, that the fourth part of the contention for the appellant cannot be maintained.

We may observe, that the view we take of the applicability of section 4 to money decrees on mortgages, is supported by the cases of *Janaki Ballav v. Hafiz Mahomed* (2), *Roghu Nath v. Paresh Nath* (3), *Nanchand Khemchand Gujar v. Yenawa* (4), and *Palaniyandi v. Veerammal* (5). In the first two cases which were decided under Act XXVII of 1860, it was assumed, that the production of a certificate would not be necessary unless a personal decree was asked for on the basis of the mortgage. In the other two cases, which were decided under Act VII of 1889, it was ruled, that when a personal decree was prayed for and granted, the requisition of a certificate as a condition precedent to such a decree is right. In these two cases, however, the mortgagee had died before the suit to enforce the security which was commenced by his representatives ; this circumstance, as we have explained in dealing with the third branch of the contention of the appellant, does not affect the matter.

The fifth head of the contention of the appellants is to the effect, that as they were members of a joint Hindu Mitakshara family with their father, the right to realise the debt has vested in them by survivorship, and may be enforced without the production of a certificate. In answer to this contention, the learned vakil for the respondent contended, that as held in *Venkataramanna v. Venkayya* (6) to make this principle applicable, it must appear on the face of the bond, that the debt claimed was due to the joint family. It has been ruled, however, in the cases of *Bissen Chand v. Chatrapat* (7), *Beeraj v. Bhyroopersaud* (8), *Pateshuri v. Bhagwati* (9) *Vethal v. Gotya* (10), and *Pallam Raju v. Bapanna* (11) that it is not necessary that it should appear on the face of the bond, that it is a joint family debt ; it is enough, if it is admitted or proved that the family is joint ; for if this much is established, the presumption is that the

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| (1) (1907) 6 C.L.J. 320; I.L.R. 35 Calc. 61. | (6) (1890) I. L. R. 14 Mad. 377. |
| (2) (1886) I. L. R. 13 Calc. 47. | (7) (1895) 1 C. W. N 32. |
| (3) (1887) I. L. R. 15 Calc. 54. | (8) (1896) I. L. R. 23 Calc. 912. |
| (4) (1904) I. L. R. 28 Bom. 630. | (9) (1896) I. L. R. 17 All. 578. |
| (5) (1905) I. L. R. 29 Mad. 77. | (10) (1899) 1 Bom. L. R. 197. |
| (11) (1899) I. L. R. 22 Mad. 380. | |

debt is a family debt, and when such a debt has vested by right of survivorship, no succession certificate need be produced. In the case before us, however, the Courts below have not investigated whether the mortgage debt was a joint family debt. We think, in all the circumstances of this case, that the appellants ought to be allowed an opportunity to have this matter determined.

The result, therefore, is that this appeal must be allowed in part and the order of the learned District Judge discharged. The case will be remitted to him for determination of the question, whether the mortgage debt was a joint family debt. If this question is answered in the affirmative, the appellants will not be required to produce any certificate. If it be answered in the negative the appellants will be afforded a reasonable time to produce the requisite certificate. We think they ought to be allowed this opportunity, because, even if their applications were dismissed on the ground of their failure to produce a certificate, it would be open to them to apply again under section 90 of the Transfer of Property Act, for, as held in the case of *Rahamat Karim v. Abdul Karim* (1) no period of limitation is applicable to an application under section 90 for a personal decree against the mortgagor. We may add, however, that the appellants will act wisely if, when the case goes back, they obtain a succession certificate so as to render unnecessary the discussion of any question in bar of their claim. Under the circumstances, the appellants, must pay the respondent, his costs of this appeal.

A. T. M.

Case remanded.

(1) (1907) 6 C. L. J. 119.

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FULL BENCH.

CIVIL.

1908.

May, 5.

*Before Sir Francis W. Maclean, K. C. I. E., Mr. Justice Rampini
Mr. Justice Brett, Mr. Justice Mitra and Mr. Justice Doss.*

SATYENDRA NATH ROY CHOWDHURY

v.

KASTURA KUMARI GHATWALIN AND OTHERS*

AND

LALA BRIJ BEHARI SAHAI

v.

KASTURA KUMARI GHATWALIN AND OTHERS.*

*Civil Procedure Code (Act XIV of 1882), Sec. 199—Judgment written when
the Judge ceased to exercise jurisdiction in the place, if valid.*

A Judge who heard the evidence in the case is entitled under section 199 of the Code of Civil Procedure to write his judgment and send it to his successor for delivery, although the judgment was written by him after he had left the judicial post which he was occupying when he heard the case.

Sundar Kuar v. Chandreshur Prosad Narain Singh (1) approved.

Appeals by the Defendant.

Suit for ejectment.

The facts sufficiently appear from the Order of Reference.

This case was referred to the Full Bench by the Hon'ble Mr. Robert Fulton Rampini and the Hon'ble Syed Sharfuddin, two of the Judges of this Court, on the 6th March 1908 with the following opinion.

ORDER OF REFERENCE.

These are two appeals against one decision, dated the 21st November 1905, of Mr. W. H. Thomson who describes himself as late Subordinate Judge of Deoghur, now Subordinate Judge of Dumka.

The facts are these. The plaintiff Srimati Thakurani Kastura Kumari Ghatwalin, through the manager appointed by the Court of Wards to manage the estate of her deceased husband, sued to eject certain defendants from lands in the Sub-Division of Deoghur. The principal defendant was the defendant No. 1, Lala Brij Behari Sahai. There were other defendants, who were sub-lessees under Lala Brij Behari. The learned Subordinate

* Full Bench Reference in Appeals from Original Decree Nos. 68 and 147 of 1906, against the decree of W. H. Thomson Esq., Subordinate Judge of Deoghur, District Sonthal Parganas, dated the 21st November 1905.

(1) (1907) I. L. R. 34 Calc. 293.

Judge speaks of them as "sub-defendants." The plaintiff obtained a decree. Some of the defendants compromised the case with her. The only defendants who are dissatisfied with the decree of the Subordinate Judge are the defendants Nos. 1 and 9; and they have preferred these two appeals to us, the appellant in appeal No. 68 being the defendant No. 9, and the appellant in appeal No. 147 being the defendant No. 1.

The grounds of appeal taken in this Court are, *first*, that the Subordinate Judge is wrong in holding that the land in dispute is not held upon a permanent tenure, and *secondly*, that the judgment of the Subordinate Judge is not legal, because it was pronounced after he had ceased to be Subordinate Judge of Deoghur or to exercise powers in that Sub-Division, having been appointed Subordinate Judge in another Sub-Division of the Sonthal Parganas, *namely*, the Sadar Sub-Division, Dumka.

It is unnecessary for us to deal with the first of these two grounds of appeal, because we consider that the second ground should prevail and that suit should be remanded to be disposed of in a legal manner by the Subordinate Judge of Deoghur.

The suit was instituted before, and tried by Mr. Thomson when he was Subordinate Judge of Deoghur, but by an order of the Local Government (to be found in the Calcutta Gazette of the 4th January 1905, page 7, and dated the 31st December 1904) Mr. Thompson was transferred to Dumka and ceased to be Subordinate Judge of Deoghur on the 17th January 1905. On this date he recorded the following order: "Defendants refuse to argue or to file written arguments. I am making over charge to-day and all the parties want me to write the judgment, so the record must be sent to Dumka, to which place I am going on transfer."

Then on the 21st November 1905, that is after a lapse of 10 months, he wrote his judgment and sent it with the following order to the then Subordinate Judge of Deoghur: "Judgment written and signed. Let the record be returned to the present Subordinate Judge of Deoghur for favour of delivery of judgment." It is to be presumed that the present Subordinate Judge of Deoghur, Mr. McGavin, delivered the judgment, but it is noticeable that the decrees were signed by Mr. Thomson. The legality of the proceedings is impugned by the appellants before us; and we have no doubt that they are illegal. The provisions of section 199 of the Code of Civil Procedure allow a Judge to pronounce a judgment written by his predecessor, but

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not pronounced. But this must mean, we think, a judgment written by a Judge when he is holding office, in which he is succeeded by another officer, and who, simply because he has not time to pronounce the judgment which he has already written, has to leave the task to his successor. The section cannot in our opinion cover a case, such as the present, in which Mr. Thomson ceased to be Subordinate Judge of Deoghur on the 17th January 1905 and was then succeeded in office by another gentleman when he proceeded to the Sadar Sub-Division of the Sonthal Parganas, namely, Dumka where, after a lapse of about 10 months, he wrote his judgment.

We may note that we find from the Calcutta Gazette of the 11th May 1904 (Page 667) that by an order of the Local Government, dated the 9th May 1904, Mr. Thomson was vested with the powers of the Subordinate Judge within the local limits of the Deoghur Sub-Division. He had, therefore, no powers of a Subordinate Judge in the whole district, and by the subsequent order of the 31st December 1904, it is clear that when he made over charge of his office to the Subordinate Judge of Deoghur, he entirely ceased to have any powers in that Sub-division.

We therefore consider that we should set aside the judgment and decrees of the Subordinate Judge, so far as the defendants Nos. 1 and 9 are concerned and remand the suits to the Subordinate Judge of Deoghur, to proceed with them as provided in section 191, Civil Procedure Code.

We are, however, met with the judgment of a Division Bench of this Court, in *Sunder Kuar v. Chandreshwar Prosad Narain Singh* (1), in which it has been held that the Judge, who has heard the evidence in a case, is entitled under section 199 of the Civil Procedure Code to write his judgment and send it to his successor for delivery although the judgment was written by him after he had taken leave or left the post which he was occupying when he heard the case. Two other cases have been cited to us, viz., *Mutty Lal Sen v. Deshkar Roy* (2), and *Parbutti v. Higgin* (3). The former which is the decision of a Full Bench, is in favour of the view we take. The latter is in favour of the view taken by the learned Judges who decided the case of *Sunder Kuar v. Chandreshwar Prosad Narain Singh* (1). But there is this distinction between the case of *Parbutti v. Higgin* (3) and the present case, that in *Parbutti v. Higgin* (3), the

(1) (1907) I. L. R. 34 Cal. 293.

(2) (1867) 9 W. R. 1.

(3) (1867) 17 W. R. 475.

Subordinate Judge who tried the case had made up his mind about it before making over charge to his successor. In the present case, Mr. Thomson had not done so, and apparently took 10 months to come to a decision in the case. But we do not rest our decision on this ground. We think it is clear that under section 199, a judgment which can be pronounced by a Judge's successor, must be one written by the Judge, while he holds office and not one written after he has ceased to exercise jurisdiction owing to his transfer, his taking leave, or his retirement. To hold otherwise may be convenient, but in our opinion is contrary to the meaning of section 199 and may lead to gross irregularities and abuses.

We must therefore refer this question to a Full Bench and we accordingly do so and invite them to decide—"whether the judgment referred to in section 199, Civil Procedure Code, which can be pronounced by a Judge's successor, is one which must be written by the Judge, while holding office as Judge, or whether it may be one written after he has ceased to exercise jurisdiction in the place where the cause of action in the suit to which the Judgment relates arose, owing to his transfer or proceeding on leave."

Babu Dwarka Nath Chackerbutty (with him Babus Tarak Chunder Chackerbutty and Girija Prosonno Roy Chowdhury) for the Appellant—referred to section 199 of the Code of Civil Procedure. The section shows that a Judge can pronounce a judgment written by his predecessor, but not pronounced. This means a judgment written by a Judge when he is holding office, in which he is succeeded by another officer, and who, simply because he has not time to pronounce the judgment which he has already written, has to leave the task to his successor. It can not cover a case like this in which Mr. Thomson ceased to be Subordinate Judge of Deoghur on the 17th January 1905 and was then succeeded in office by another gentleman when he proceeded to the sudder Sub-division, namely, Dumka, where, after a lapse of about 10 months, he wrote his judgment.

There will be a great practical inconvenience if such a procedure be allowed; for instance, an acting Subordinate Judge after reserving judgment in a case, reverts to his office of Munsiff and then writes and sends judgment; can this judgment be said to be a judgment of the Court and be delivered by his successor?

See *Mutty Lal Sen v. Deshkar Roy* (1) and *Parbutty v. Higgins* (2).

(1) (1867) 9 W. R. L.

(2) (1875) 17 W. R. 475.

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[MITRA J.—The law has been changed since those decisions. Section 199 of the Code of Civil Procedure was introduced in 1893].

Referred to the judgments in Appeal from Appellate decrees Nos. 2239 and 2264 of 1905 (unreported.) The object of delivering judgment in open Court will be frustrated.

[Doss J.—See the case of *Girja Shankar v. Gopalji* (1),]

Babu Ram Charan Mitra for the Respondents was not called upon.

The judgments of the Court are as follows :—

Maclean C. J.—The question submitted to the Full Bench is whether the judgment referred to in section 199, Civil Procedure Code, which can be pronounced by a Judge's successor is one which must be written by the Judge, while holding office as Judge, or whether it may be one written after he has ceased to exercise jurisdiction in the place where the cause of action in the suit to which the judgment relates arose, owing to his transfer or proceeding on leave. I think the language of the question is a little involved, and the real question which is raised by this reference is whether the decision in the case of *Sunder Kuar v. Chandreshur Prosad Narain Singh* (1) which held that the Judge who has heard the evidence in the case is entitled under section 199 of the Civil Procedure Code to write his judgment and to send it to his successor for delivery, although the judgment was written by him after he had taken leave or left the post which he was occupying when he heard the case, is correct. The question seems to me to depend entirely upon the construction of section 199 of the Code of Civil Procedure :—It is a very short section, and, in my judgment, its construction is not susceptible of any real difficulty. The section runs as follows :—“A Judge may pronounce a judgment written by his predecessor but not pronounced.” In this case, the suit was heard by Mr. Thomson when he was Subordinate Judge of Deoghur, and, he was subsequently transferred to Dumka and ceased to be Subordinate Judge of Deoghur on the 17th January 1905. On that date he recorded the following order :—“defendants refuse to argue or to file written argument. I am making over charge to-day and all the parties want me to write the judgment ; so the record must be sent to Dumka, to which place I am going on transfer.”

(1) (1905) I. L. R. 30 Bom. 241 ; 7 Bom. L. R. 551.

(2) (1907) I. L. R. 34 Cal. 293.

I regret Mr. Thomson took ten months to write his judgment. He however did write it and sent it to his successor at Deoghur to deliver and he did deliver it. It is urged that this is illegal and that section 199 does not justify such a procedure. In my opinion, it does. There is nothing in that section which indicates directly or indirectly that the judgment of the Judge who is leaving the Court must be written by him before he has left. That is the point urged by the learned vakil for the appellant. Apart from authority, and had it not been for the respect I feel for the view of the referring Bench, I personally should entertain no doubt upon the question of the construction of the section ; and it seems to me that the authorities are in favour of the view I have expressed. I have already referred to the case of *Sundar Kuar v. Chandreshur Prosad Narain Singh* (1), which is the last authority upon the point. There is a similar decision in the case of *Girja Shankar Narsiram v. Gopalji Gulab Bhai* (2) in which the Court held that section 199 was a clear answer to a similar objection. As regards the older cases, the case of *Parbutty v. Higgins* (3) is an authority against the present appellant ; and the earlier case *Mutty Lal Sen v. Deshkar Roy* (4) has no application to the question now under discussion : for section 199 was not in existence when that case was decided ; besides, the facts of that case are obviously different—all that was there held was that the opinions (reduced to writing) of Judges who heard the case, but who had ceased to be Judges of the High Court before judgment was pronounced, could not be treated as judgments but must be regarded as mere memoranda. Two of the Judges had retired, and the third had died before judgment was delivered. That is not the present case.

Before I part with the case, I desire to express strongly that the Judge when transferred ought not to have allowed such an inordinately long period as ten months to elapse before sending his judgment to his successor. He ought to have done so as quickly as he reasonably could, and I hope this will be done in future.

I therefore answer the question by saying that the Judge who heard the evidence in the case is entitled under section 199 of the Code of Civil Procedure to write his judgment and send it to his successor for delivery, although the judgment was written

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(1) (1907) I. L. R. 34 Calc. 293.

(2) (1905) 7 Bom. L. R. 951 ; I. L. R. 30 Bom. 241.

(3) (1875) 17 W. R. 475.

(4) (1867) 9 W. R. 1.

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by him after he had left the judicial post which he was occupying when he heard the case.

The result is that the appeal is sent back to the Division Bench which made the reference with this intimation of our opinion.

The appellant must pay the costs of this reference—hearing fee three hundred rupees.

Rampini J.—I do not wish to press the view I expressed in the reference : and I agree with the learned Chief Justice.

Brett J.—I agree with the learned Chief Justice.

Mitra J.—I agree with the learned Chief Justice. Babu Dwarka Nath Chakravarti in the course of his argument referred to two cases (Appeals from Appellate Decrees Nos. 2264 and 2239 of 1905) decided by me in the beginning of the year 1905. The facts of those cases are clearly distinguishable from those of the present case, and it appears to me that the question which has now been argued was not argued then before me.

Doss J.—I agree in the judgment of the learned Chief Justice.

A. T. M.

Case sent back.

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The first sub-section of section 87 of the Bengal Tenancy Act shows that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due, and for cultivating the land.

Whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case.

In order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under sub-section 2 of section 87 of the Bengal Tenancy Act is not necessary. The only effect of the service of notice is to make it obligatory upon the tenant to have a speedy determination of the question whether there has been an abandonment or not.

Section 87 of the Bengal Tenancy Act is not exhaustive and a landlord is not a wrong-doer merely because he re-enters upon the holding before he has followed the procedure laid down in that section.

When the holding is a non-transferable one, and the ryot executes a mortgage, the mortgage is inoperative as against the landlord, but as between mortgagor and mortgagee, the mortgage is operative.

Where the mortgagee of a non-transferable occupancy holding purchases the holding in execution of his mortgage decree and takes possession, the possession of the tenant mortgagor completely ceases, and the holding passes into the occupation of the mortgagee. As against the landlord, the mortgagee auction-purchaser is a trespasser. The landlord is entitled to sue him and to obtain a decree for ejectment; in such a suit the tenant who is not in occupation is not a necessary party.

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The expression “movable property” in Article 89 of Schedule II of the Limitation Act includes money.

Accounts—(Contd.)

A suit not merely for an account but also to enforce in the plaintiff's favour the charge created to secure the moneys which might be found due from the agent to his principal on his accounts, falls within Article 132 of the Second Schedule to the Limitation Act, and the period of limitation is twelve years from the time when the money sued for becomes due. **Hafez-**

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Assessment of holding, legality of, if may be questioned in Civil Court—Jurisdiction of Civil Court—Principle of assessment, <i>See</i> Bengal Municipal Act, Secs. 85, 87 (d), 92, 113, 114, 116 ...	631
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Assignee of land as well as arrears of rent, <i>See</i> Landlord, who is ...	425
Assignor and assignee—Unfair and unconscionable bargain and inadequate price, raised by third party, if can be allowed.	

In a suit by an assignee to enforce a right, where the assignment is supported by the assignor, no question can be raised that the transaction was an unfair and unconscionable bargain, for an inadequate price as between the assignor and the assignee. Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu ...	325
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Auction-purchaser, decree-holder—Execution—Party—Civil Procedure Code, Sec. 244, <i>See</i> Sale certificate ...	426
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Auction-purchaser—(Contd.)

_____ , suit for establishment of title—Title deed, <i>See</i> Sale certificate	384
_____ , title of, when accrues, <i>See</i> Title of auction-purchaser when accrues	1

Authority , who is to sign—Local Government—Criminal Procedure Code, Sec. 196, <i>See</i> Indian Penal Code, Sec. 124A	49
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Award , suit to set aside—Court fee, <i>See</i> Civil Procedure Code, Sec. 283 ...	36
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Batta, *agreement to pay, if and when legal.*

A claim for *batta* being a claim in excess of rent is not enforceable at law.

<i>Batta</i> is not <i>abwab</i> , if it is merely an allowance for the exchange of sicca rupees into Company's rupees, the latter of which was introduced by Act XVII of 1835, and the former ceased to be legal tender by Act XIII of 1836. If the rent claimed has been fixed before 1836, <i>batta</i> is <i>prima facie</i> not an <i>abwab</i> , but if it has been fixed subsequently, it is <i>prima facie</i> an <i>abwab</i> . Rameshar Koer alias Dulpin Saheba v. Gobardhan Lal ...	202
_____—Presumption, <i>See</i> <i>Abwab</i>	251

Benami , with a view to effect fraud—Fraud absolutely defeated—Suit by real owner against benamidar—Right of real owner to recover possession of his property, <i>See</i> Benami conveyance	528
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_____ , suit by real owner against—Colourable conveyance in fraud of creditor—Fraud absolutely defeated—Right of real owner to recover possession of property, <i>See</i> Benami conveyance	528
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Benami conveyance —Colourable conveyance in fraud of creditor—Fraud, absolutely defeated—Suit by real owner against benamidar—Right of real owner to recover possession of his property—Indian Limitation Act (XV of 1877), Schedule II, Articles 91 and 144.	
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When property has been transferred *benami* with a view to effect fraud, but the fraud is not effected there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme and recovering possession of the property. If however the contemplated fraud has been effected, the fraudulent grantor has lost the right to claim the aid of the law to recover the property he has parted with.

As a *benami* conveyance is an inoperative instrument, it is not necessary to set it aside. A suit to recover the property is governed not by Art. 91 but by Art. 144 of Schedule II of the Limitation Act. **T. P. Petherpermal**

Chetty v. R. Muniandy Servai	528
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Bengal Embankments Act , Sec. 76—Erection of embankment within prohibited area—Bunds, adding to or repairing of existing bunds, if legal—Obstruction of flow of water.	
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Section 76 of the Bengal Embankments Act (II of 1882, B. C.) prohibits not only the construction of new *bunds* but adding to old *bunds* in a prohibited area, so as to obstruct the flow of water.

The construction of a *bund* in a prohibited area interferes with and obstructs the flow of water and a person who so constructs a *bund* commits

Bengal Bmbankments Act—(Contd.)

an offence within the meaning of section 76 of Act II of 1882 (B.C.)

Dwarka Nath Majhi v. The Emperor ... 239

Bengal Excise Act, Secs. 53, 59, 61,—Ganja, being in possession of—Sale without license—Contravention of condition of license—Master and servant.

A person who is licensed to sell *ganja* at one place would be guilty under section 59 and not under sections 53 and 61 of the Bengal Excise Act, if he is found to have been in possession of a large quantity of *ganja* and to have sold a part of the same at another place. His servant would in such a case not be guilty of any offence. **Gostho Behari Saha v. King Emperor** ... 377

Bengal Municipal Act, Secs. 85, 87 (d), 92, 113, 114, and 116—Assessment of a holding—Assessment, if ultra vires—Assessment, legality of, if may be questioned in a Civil Court—Civil Court, jurisdiction of—Principle of assessment—"Circumstances and property," meaning of.

Section 116 of the Bengal Municipal Act (III of 1884), does not take away the jurisdiction of the Civil Courts in a case in which it is alleged and established that the assessment, the propriety of which is in controversy, is open to objection on the ground that it is *ultra vires*; in other words, it is only when the action of the Municipality has been exercised in conformity with the powers conferred upon it by the Act, that the Civil Court has no authority to interfere. The test in such cases is, whether the assessment is or is not in conformity with the statutory provisions.

Errors in assessment which constitute irregularities merely and do not go to the ground work of the tax and render the assessment void, can be corrected only in the manner provided by the statute which creates the authority, and the remedy so provided must be treated as exclusive. On the other hand, where the defects in assessment are jurisdictional, rendering them void, the persons aggrieved thereby are entitled to invoke the ordinary judicial remedies, and all clear violations of law give rise to jurisdictional questions. In other words, while mere erroneous exercise of judgment is not reviewable by the Civil Court, any excess of jurisdiction, makes the act liable to challenge in such Court.

The term "*property*" designated as a subject of taxation without any qualification includes both real and personal property or estate and intangible as well as tangible rights of value.

The word "*circumstances*" was not introduced in section 85 of the Act, to restrict the term "*property*"; the intention of the Legislature seems to have been on the other hand, to widen the scope of the section, so as to make taxable what might perhaps be not properly comprised under the term "*property*" and at the same time ought not to escape assessment. The property of the defendant which was taxable, in the present case, under the law, was unquestionably his whole income, and the fact that he spent only half of it within the Municipality does not make his circumstances and property within the Municipality worth only that much. **Chairman of Giridih Municipality v. Sreesh Chandra Mazumdar** ... 631

—, Sec. 85 cl (a)—'circumstances and property,'
meaning of, See Bengal Municipal Act, Secs. 85, 87 (d), 92, 113, 114,

116 ... 631

Bengal Rent Recovery Act, Sec. 16—Sale—Purchase—Encumbrances, avoidance of—Estoppel—Plaint—New case—Notice to quit—Maintainability of suit.

Where a purchaser of a tenure in a sale held under the provisions of Act VIII of 1865 B. C. sued the person in possession for rent, and obtained an *ex parte* decree, and then brought a suit for enhancement of rent to which the defendant pleaded that he was entitled to hold the land under a *mokurari potta* upon which the plaintiff withdrew his suit and brought the present suit for ejectment :

Held, the plaintiff was not estopped from bringing the suit by reason of his having brought a rent suit against the defendant. Under sections 16 of the Act, he is allowed to avoid encumbrances, and if the defendant would not accept the position of tenant offered him and pay a reasonable rent, the plaintiff is entitled to eject him.

No previous notice to quit need be given for the maintainability of a suit of this nature. **Arsali Sadagar v. Ram Satya Bhakat** ... 191

Bengal Tenancy Act, Sch. II art 2 (a)—Rent, deposit of—Onus—Notice, service of, by post, presumption—Fact, question of—Ordersheet, *ex parte* entry in, evidentiary value of.

If a tenant relies upon clause (a) of article 2 of Schedule III of the Bengal Tenancy Act, he must prove that there was an application which fulfilled the requirements of section 61, sub-section (2) of the Bengal Tenancy Act, and that a deposit was made under section 61 after the arrear had fallen due ; he must also show that notice under section 63 was served on the landlord and prove the date when the service was effected.

There is no presumption that a letter, which was posted, was properly addressed, and the presumption that the letter reached the addressee, has no application till it is established that the letter was properly addressed.

Before the presumption of due service can be applied, it is necessary to prove that the notice was sent in a cover which was properly addressed.

The presumption that a notice sent by post was duly served is not a conclusive presumption of law ; it is merely a presumption of fact ; and whether it arises in a particular case or not, depends upon all the circumstances.

An *ex parte* entry in the order sheet is by no means conclusive evidence, if it is admissible in evidence at all, as against the landlord, who was not a party to the proceedings for deposit under section 61 of the Bengal Tenancy Act. **Mir Tapurah Hossein v. Gopi Narayan** ... 251

Sch. III, Art. 2 (b)—Limitation of rent suits—Fuslee year—Rent due on the last day of Bhadra—Period of limitation.

The period of limitation where the Fuslee year prevails is three years from the last day of Jeith. If any instalment is due on the last day of Bhadra, the period of limitation will expire on the last day of Jeith in the third subsequent year, so that in such a case, the suit must be brought not within three years but within two years and nine months. **Iswardhari Singh v. Ram Brich Roy** ... 106

Sec. 11—Non-permanent tenure if transferable, Sec. Ejectment ... 553

section 21—Ejectment, suit for—Cultivating raiyat—Leases construction of—Occupancy right, accrues in what land.

Bengal Tenancy Act,—(Contd.)

Under the provisions of section 21 of the Bengal Tenancy Act, if a tenant is an occupancy or settled raiyat in respect of some lands in a village, he is entitled to possession as an occupancy raiyat of the whole of the lands he holds in the village, *provided he holds them* (that is, the lands other than those of which he is an occupancy or settled raiyat) as a raiyat. But if he holds them as a tenure-holder, his occupation of some lands as a raiyat will not give him the rights of a raiyat in the other lands. **Bujrangi Raut v.**

M. H. Mackenzie	475
_____, Sec. 61, Sub-Sec. (2)—Rent, deposit of—Onus, <i>See</i>	
Bengal Tenancy Act, Sch III, Art. 2 (a)	251
_____, Secs. 65, 165—Decree obtained in Suit for rent by	
landlord who parted with his interest after accrual of rent, if superior	
to darputinder's lien under Sec. 13 (4) of Putni Regulation—Incum-	
brance, <i>See</i> Landlord parting with his interest	652
_____, Sec. 69, applicabilty of, <i>See</i> Civil Procedure Code,	
Sec. 13	251
_____, Sec. 69—Declaration that the appraisement by the	
collector was invalid—Trial of issue in Subsequent suit "whether the	
rent of the holding is payable entirely in cash or partly in cash and	
partly in kind," if barred, <i>See</i> Civil Procedure Code, Sec. 13 ...	251
_____, Sec. 87, Sub-sec. 2—Service of notice whether	
necessary, <i>See</i> Abandonment	72
_____, Sec. 87 not exhaustive—Re-entry by landlord—	
Effect of not following the procedure laid down in Sec. 87 of the	
Bengal Tenancy Act, <i>See</i> Abandonment	72
_____, Sec. 87, effect of not following the procedure laid	
down in—Re-entry by landlord, <i>See</i> Abandonment	72
_____, section 87—Non-transferable rayati holding—	
<i>Transferee—Underlease—Forfeiture—Landlord and tenant—Secundum</i>	
<i>allegata et probata.</i>	

Where a raiyat holding a non-transferable holding transfers it to a third person, but remains in occupation of the land as his vendee's under-rayati, repudiates his relation as tenant, refuses to pay rent to the landlord of the rayati holding and maintains his right to transfer a non-transferable holding and seeks by suit to re-occupy the land not as his (landlord's) tenant, but as the under-tenant of his vendee, his suit must fail. The case is not one of abandonment under section 87 of the Bengal Tenancy Act.

If the rayat-transferee is willing to revert to the former state of things, to re-occupy the land and pay rent to the landlord, then a suit for possession is maintainable against the landlord.

The transferee of a non-transferable rayati holding is not a tenant of the landlord and has no legal connection with the land.

The provisions of section 87 of the Bengal Tenancy Act are not exhaus-

tive. Rajani Kanta Biswas v. Ekkari Dass	78
_____, Sec. 87 not exhaustive, <i>See</i> Bengal Tenancy Act,	
Sec. 87	78

Bengal Tenancy Act,—(contd.)

_____, Secs. 93, 95—Common manager, appointment of, when complete—Manager resigning, effect of—Judge, power of.

The appointment of a common manager under section 95 of the Bengal Tenancy Act is only complete when the required security has been given and possession has been taken under the order.

Semle :—The powers of a Judge under section 95 are not exhausted by the appointment of a person who has entered upon the duties of his office and has subsequently vacated the same by death, voluntary relinquishment or otherwise. The abdication of the manager has not the effect of restoring the estate to the owners. **Dwarka Nath Mitter v. Bankutesh Lal**

Mitter 109

_____, Secs. 105, 106, 108, 109A(3)—Record of rights—Final publication—Settlement Officer, jurisdiction of—Alteration of entry without presentation of plaint—Decision settling rent—Appeal.

A draft record-of-rights was published on the 31st March 1903, the parties being asked to lodge their objections, if any, within one month. No objection was lodged and the record was finally published on the 9th June 1903. The Settlement Officer then proceeded to settle fair and equitable rents, and on an application by the tenants, dated 14th August 1903, altered the record as regards some of them entering their lands as 'lakheraj' instead of 'mal.' He refused their prayer to be recorded as raiyats at fixed rates of rent. He also imposed a limitation as regards enhancement of rent :

Held, that the Settlement Officer had no jurisdiction, in the absence of the presentation of a plaint on a regularly stamped paper, to make the alterations in the record. **Sambhu Chandra Hazra v. Purna Chandra**

Pal 103

_____, Secs. 144, 193, Sch. III Art. 2—Suit for money due as price of trees—Suit for arrears of rent—Damages for breach of contract, *See* Forest right 152

_____, Sec. 148—Suit for rent—Aggregate rent—Aggregate area—Single suit—Maintainability of suit—Execution of decree.

A landlord is entitled to bring one suit for the total rents of three separate holdings giving the total area as the sum of the three holdings. He is not bound to bring three separate suits.

The suit is maintainable, though the landlord may have difficulty in executing the decree obtained in it under the special procedure prescribed in the Bengal Tenancy Act. **Nanda Lal Mukherji v. Sadhu Charan**

Khan 96

_____, Sec. 167—Notice, proof of service of—Notice, validity of—Order-sheet of the proceedings, entries in, evidential value of.

Until the notice has been properly served under section 167 of the Bengal Tenancy Act upon the incumbrancer, the incumbrance subsists.

It is obligatory on the purchaser to show that the notice under section 167 had been served in the manner prescribed. The entries in the order-sheet are not *prima facie* evidence against the incumbrancer that the notice was served.

The purchaser who relies upon the service of notice must prove it either by the production of the person who served the notice or by any other

Bengal Tenancy Act.—(Contd.)

means recognized by law ; and if a question arises as to the validity of the notice, it must be shown that it was a valid notice and was signed by a competent officer as required by cl. (1) of section 167 of the Bengal Tenancy

Act. **Radhay Koer v. Ajodhya Das** 262

-----, Sec. 184—Question of limitation abandoned in the

First Court, *See* Limitation 152

-----, Sec. 188—Arrear of putni rent due to a co-sharer zemindar—

Suit by him under Act VIII of 1885 to recover the whole rent of the tenure—Refusal of his co-sharer zemindars to join as plaintiffs to bring the same—Law applicable to the case—Agreement to pay shares in the putni rent separately—Its effect on the right to sue on the tenure.

Appellant, a co-sharer in a zemindari interest, in consequence of the putni rent falling into arrear so far as the share which should have come to him was concerned, brought a suit making the putnidars defendants and joining as co-defendants his co-shares in the zemindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for that purpose to bring to sale the tenure itself. The plaint also asked in the alternative for a decree for the appellant's share of the rent :

Held, that the appellant was competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due to respect of the property in suit.

Held, also, that the law applicable to the present case must apparently be that by the express terms of the Bengal Tenancy Act in the event of the rent being unpaid, the owners of the zemindari interest were entitled, by suit under that Act, to bring a putni to sale, with consequences prescribed by that Act, and it was a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as plaintiffs, could bring them into the suit as defendants, and sue for the whole rent of the tenure, unless there was something to exclude the case from the operation of those rules.

It was contended that the case was excluded from the operation of those general rules on the ground that by express or implied agreement between the zemindars and the putnidars, the shares in the putni rent of the several zemindars were to be paid, and so far as they were paid at all, were in fact, paid separately :

Held, that the right to bring the tenure for sale for arrears of rent remained intact, and also the right of one sharer to making his co-sharer defendants when they would not join as plaintiffs.

Their Lordships had no inclination to question the course of rulings in Bengal that agreement, either expressly proved or implied by the conduct of the parties might establish the right to sue separately for the share of rent receivable by the separate share-holders.

Their Lordships thought that it was clearly a sound view of the law, as clearly laid down in Bengal, that such an arrangement, expressed or implied, merely affected the right to sue separately for rent, and in no other respect modified the terms of the holding. **Raja Pramada Nath Roy v. Raja**

Raman Kant Roy 120

Board's letter—Admissibility in evidence, *See* Evidence Act, Secs. 13, 65,

66(2) 90

Building erected without sanction—Notice, if necessary, <i>See</i> Calcutta Municipal Act, Secs. 372, 383, 449(1)	243
Bunds , adding to or repairing of existing, if legal—Prohibited area, <i>See</i> Bengal Embankments Act, Sec. 76	239
——, construction of, obstructing flow of water—Prohibited area, <i>See</i> Bengal Embankments Act, Sec. 76	239
Burden of proof —Renunciation of relation by setting up title in third person, who will prove, <i>See</i> Landlord and tenant, denial of relation ...	648
——, contingencies, value of, <i>See</i> Compensation, apportionment of ...	284
Calcutta Municipal Act , Secs. 372, 383, 449 (1)— <i>Demolition of corrugated iron shed, order directing—Building, erected without sanction—Notice, if necessary—Inconvenience or obstruction to public.</i>	
A corrugated iron shed is a "building" as defined in the Calcutta Municipal Act.	
The issue of a notice under section 383 is not a condition precedent to a proceeding under section 449 (1) of the Act for the demolition of a building erected without sanction in contravention of the provisions of section 372.	
Susarmoyee Dabee v. The Corporation of Calcutta ...	243
Cantonment Land —Rights of alienation and management and control of the same in the absence of any treaty, <i>See</i> Native State	401
Cause of Action , failure of—Suit for possession—Proper decree to be made in such a case, <i>See</i> Practice	44
Central Provinces Rent Law , Sec. 43—Central Provinces Tenancy Act of 1898, Secs. 45 cl. (3), 47—Transfer of part of occupancy holding, <i>See</i> jurisdiction, when exclusive	499
——— Tenancy Act of 1898, Secs. 45 cl. (3), 47—Occupancy holding, transfer of part of—Ejectment, suit for, <i>See</i> Jurisdiction, when exclusive	499
Champertry — <i>Public Policy.</i>	
The English law as to maintenance and champerty is not applicable to India. Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu ...	
Charge on immoveable property by attorney—Power of attorney, <i>See</i> Registration Act, Secs. 17, 21, 49	149
——— <i>to Jury—misdirection—Material ingredient of offence not stated—Judge's opinion on facts—Jury sole judges of fact—First Information Report.</i>	
A Sessions Judge in charging the jury in a case of culpable homicide not amounting to murder, omitted to tell them that they must come to a conclusion as to whether in causing the death of the deceased the accused had the intention to cause death or such injury as was likely to cause death or the knowledge that he was likely to cause death.	
<i>Held</i> :—Such omission was a clear misdirection.	
The Judge in giving his opinion on the facts must tell the jury that his opinion is not binding on them and that they were the sole Judges of fact.	
If the first Information Report is properly made evidence, it must be read out to the Jury as a whole and if not, the Judge should abstain from all reference to it. He must not comment on it without placing it before the Jury. Natabar Ghose v. The Emperor	
	599

Charges under Secs. 178, 179, Indian Penal Code—Refusing to take oath and answer questions—Misjoinder—Criminal Procedure Code, Secs. 234, 537, *See* Criminal Procedure Code, Secs 234, 235, 480, 482, 537 ... 63

Charge and Mortgage, difference between, *See* Transfer of Property Act, Secs. 58, 59, 100 ... 492

Chaukidar—Chakran land—Sub-lease before resumption, *See* Chaukidari Chakran Act, Secs. 51, 85 ... 85

_____, lands held by, revert to whom—Putnidar—Zemindar, *See* Chaukidari Chakran land ... 593

Chaukidari Chakran lands—Possession, suit for—Zemindar and putnidar—Resumption by Government and subsequent settlement with zemindar—Frame of suit.

Certain lands included in a *putni pottah*, having been chaukidari chakran lands, were resumed by Government and subsequently settled with the zemindar. The putnidar sued for possession of these lands :

Held, the suit was one for possession and not for specific performance of a contract and was maintainable, even if all the parties to the contract were not made parties to the suit. **Kumar Bunwari Mukunda Deb v. Bidhu Sundar Thakur** .. 439

Chaukidari Chakran, Sec. 51—Chaukidari Chakran lands—Resumption, sublease before—Resumption, effect of—Zemindar—Chaukidar—Collector, lease by.

Where chaukidari lands are resumed by Government and settled with a zemindar, all rights created in such lands by the chaukidar in favour of third parties, come to an end ; but if any transfer has been made by the zemindar before the resumption and the land is settled with him by the Collector, the transferee would be entitled to the benefits of such settlement.

If any transfer is made by the Collector, acting for and in behalf of the chaukidar, such transfer also ceases to have effect after the settlement.

Krishna Kinkar Datta v. Mohunt Bhagaban Das ... 85

Chaukidari Chakran land—Putni, construction—Zemindar—Putnidar—Lands held by Chaukidar, revert to whom, on resumption.

In the absence of a contract to the contrary, the zemindar who appoints and dismisses chowkidars and is in enjoyment of their services since the creation of the putni lease is entitled to the lands held by the chowkidars after the resumption of such lands by the Government. **Nitya Nund Haara v. Maharajadhiraj Bejoy Chand Mohatab** ... 593

_____, Sub-lease before resumption—Resumption, effect of—Zemindar—Chaukidar, *See* Chaukidari Chakran Act, Sec. 51 ... 85

Cheating, attempt at—False representation to pleader—Damage or harm in mind, reputation, *See* Indian Penal Code, Secs. 417, 511 ... 377

Chota Nagpore Encumbered Estates Act, Sec. 3 (3) (c),—Contract by person subsequently declared to be owner of Encumbered Estate—Subsequent withdrawal of encumbrance—Revival of validity—Barring of pending suits—Debts and liabilities, meaning of.

A contract, entered into by a person who is subsequently declared to be the heir of a deceased person whose estate had been at the time of the contract taken charge of under the Encumbered Estates Act, is void as such person had no competency to contract.

Chota Nagpore Encumbered Estates Act,—(Contd.)

Even though at the time of the execution of the contract he had not been declared to be the heir, yet as soon as he was found to be the heir, he became heir from the time of the devolution of the estate, which was admittedly prior to the execution of the contract and such contract became void for want of capacity to contract.

On the release of the estate from the operation of the Acts, the validity of the contract could not be revived as it was absolutely void.

While the suit was pending the estate was taken charge of for the second time and the suit therefore became barred.

It does not matter, if the particular liability has not been mentioned in the application under the Act, as 'debts' and liabilities,' in section 3, mean 'all debts and liabilities of the holder of the estate taken charge of other than debts or liabilities incurred to Government.' **Raja Satrugnan**

Deo Dhabal v. Raja Jagadish Chandra Deo Dhabal ... 578

Landlord and Tenant Procedure Code, Sec. 37—

Denial of tenant's title by landlord—Limitation Act, Sch. II Arts. 138, 142, *See* Suit to recover tenure ... 560

Circumstances and property, meaning of, *See* Bengal Municipal Act, Secs. 85, 87(d), 92, 113, 114, 116 ... 631

Civil Court, Competency of, to reconsider actions of revenue authorities, *See* Land Registration Act ... 395

—, duty of—Reference, bad, *See* Land Acquisition Act ... 445

—, jurisdiction of—Assessment, legality of, may be questioned in Civil Court—Principal of assessment, *See* Bengal Municipal Act, Secs. 85, 87(d), 92, 113, 114, 116 ... 631

— **Procedure Code, Sec. 13—Decree not giving relief against party when binding, *See Res judicata* ...** 563

—, Sec. 13 Expl. II—'Ought' to have been made a ground of defence, *See Res judicata* ... 504

—, Sec. 13—Remission of rent—Revenue Courts—Character of land—Evidence, *See Res judicata* ... 202

— **Sec. 13—*Res judicata*—Matter directly and substantially in issue—Bengal Tenancy Act, Sec. 69, applicability of.**

The Court is not precluded under section 13 of the Civil Procedure Code from trying an issue whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, as it was not directly and substantially in issue in a previous litigation between the same parties where the substantial relief sought was a declaration that the appraisement made by the Collector under section 69 of the Bengal Tenancy Act was invalid.

Section 69 of the Bengal Tenancy Act is applicable upon the assumption that the rent is taken by appraisement or division; the only matter in controversy between the parties is as to the quantity, value or division of the produce; the section ceases to be applicable when there is a *bona fide* dispute as to the character of the holding itself. **Mir Tapura Hossein v. Gopi**

Narayan ... 251

—, Sec. 13—"Competent to try such subsequent suit, or the suit in which such issue has been subsequently raised" meaning

Civil Procedure Code,—(Contd.)

of—Competency in regard to the whole or part of the subject matter of litigation—Competency of the original Court and not that of the appellate Court to be looked to, <i>See Res judicata</i>	470
—————, Secs. 16A, 17, 57—Procedure when Court's jurisdiction is doubtful, <i>See Jurisdiction</i>	152
—————, Secs. 108, 562— <i>Rehearing—Remand of case—Trial on merits.</i>	

In an application under Sec. 108 of the Civil Procedure Code on the grounds of fraud and suppression of summons, the Munsiff rejected the application holding there was no fraud and no suppression. On appeal the District Judge passed the following judgment :

"This was an application under Sec. 108, Civil Procedure Code. After hearing arguments of pleaders, I am of opinion that this is a fit case for remand. Ordered accordingly that the appeal be allowed and the suit be remanded to the lower Court for trial on its merits."

Held, this was not a proper judgment. The case having been in fact tried on the merits, the District Judge had no jurisdiction to remand it but should have come to a conclusion on the evidence. **Sonaulla Sarkar v.**

Beakul Mandal	379
—————, Secs. 108, 350, 623— <i>Insolvency proceeding—Ex parte order, setting aside of—Review.</i>	

Section 350 of the Civil Procedure Code contemplates that on the date fixed for hearing, the Court shall examine the judgment-debtor in the presence of the persons on whom notice has been served or their pleaders. This should be strictly carried out.

If the objector had no notice of the application for insolvency, he is entitled to apply under section 108 of the Civil Procedure Code to set aside an *ex parte* order passed under section 350 of the Code ; but if notice had been served on him and he was prevented by any sufficient reason from appearing and if the case was heard *ex parte* under section 350, he is entitled to make an application under section 623 of Civil Procedure Code to set aside the *ex parte* order on the ground that it was in contravention of section 350. **Mool Chand Ram v. Sarjoog Pershad**

—————, Sec. 136, Scope of—Discretion—Defence when to be struck off, <i>See Interrogatory, failure to answer</i>	295
—————, Sec 199— <i>Judgment written when the Judge ceased to exercise jurisdiction in the place, if valid.</i>	

A Judge who heard the evidence in the case is entitled under section 199 of the Code of Civil Procedure to write his judgment and send it to his successor for delivery, although the judgment was written by him after he had left the judicial post which he was occupying when he heard the case. **Satyendra Nath Roy Chowdhury v. Kastura Kumari Ghatwalin and**

Lala Brij Behari Sahai v. Kastura Kumari Ghatwalin	666
—————, Sec. 211—Interest, rate of, <i>See Mesne profits</i>	197
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Civil Procedure Code, Sec. 244—'Representative,' who is—Beneficial owner.

A person for whom the predecessor of the judgment-debtors was the *benamdar* and who is therefore really interested in protecting the property, is a 'representative' of the judgment-debtors within the meaning of section 244 of the Civil Procedure Code. **Shibkumar Lal Panday v.**

Maidhur Gasi 299

—, Sec. 244—Auction-purchaser, decree-holder—Party

—Execution, *See* sale certificate 436

—, Sec. 244—*Shebait, personal decree against—Claim to attached property on behalf of idol, if triable in execution proceedings.*

An objection of a shebait on behalf of the idol to the attachment of immovable property in execution of a decree passed against him personally is triable under section 244 of the Code of Civil Procedure. **Jogendra Nath**

Sirkar v. Gobinda Chandra Dutt 537

—, section 257A—*Agreement to pay decretal amount by instalments—Suit to enforce agreement, if maintainable.*

An agreement between a decree-holder and a judgment-debtor without the sanction of the Court whereby the former agreed to take the decretal amount by instalments, after allowing certain remission and where the latter executed a bond hypothecating certain property and which contained a stipulation that the decree-holder would be competent to realise the amount in execution of decree on default of payment of two consecutive instalments, can be enforced by a suit. The provision as to giving time to execute the decree is not illegal, though it may be incapable of enforcement for want of sanction. **R. Belchambers v. Sarat Chunder Ghosh** 543

—, Sec. 283—*Suit under it—Stamp on the plaint—Court Fees Act (VII of 1870), Sch. II, Art. 17, clause (i).—Declaratory suit and injunction—Value of suit.*

Where a suit is brought under Sec. 283 of the Civil Procedure Code, the proper Court fee payable on the plaint is Rs. 10 under clause (i) of Art. 17 of Schedule II of the Court Fees Act.

When a suit asks for a declaration and for an injunction, it is not one merely for declaratory decree but also for consequential relief.

When a plaintiff seeks to challenge a decree in execution of which his property has been attached, the value of the action is the value to the plaintiff, so that if the execution debt exceeds the value of the property, the latter is the value of the suits; if the execution debt is less than the value of the property, the former is the value of the suit.

In suits to set aside summary decisions as also in those dealing with arbitration awards, the amount of Court Fees payable on the plaint does not depend upon the value of the suit. **Bibi Phul Kumari v. Ghansyam Misra** 36

—, Secs. 310 A and 244—*Deposit to set aside a sale—Purchaser of a portion of an occupancy holding, right of, to make the deposit—Sale of the holding for its own arrears—Transferability of the holding—Appeal, if lies against an order reversing an order setting aside a sale.*

The purchaser of a portion of an occupancy holding, whether it is transferable by custom or not, is entitled to make a deposit under section 310A of the Civil Procedure Code to set aside a sale.

Civil Procedure Code.—(Contd.)

The question whether the purchaser of a portion of an occupancy holding is entitled to come in under section 310A of the Civil Procedure Code to make a deposit and to have a sale held for its own arrears set aside is one that comes under clause (c) of section 244 of the Code and an appeal and a second appeal lie in the case. **Omar Ali Majhi v. Moonshi Basiradeen**

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Equitable rights, <i>See</i> Title of auction-purchasers when accrues ...	1.
Sec. 331—Resistance or obstruction—Decree for partition—	
Decree for possession—Partition Act (IV of 1893), Sec. 4.	

When a person is held entitled to the possession of a share in certain property after partition, and a Commissioner is appointed to partition the property and put him in possession of his share, resistance to such Commissioner is 'resistance or obstruction,' within the meaning of section 331 of the Code of Civil Procedure to a decree for possession.

It is only when the suit is for partition, that a member of the joint family may buy out the plaintiff, under section 4 of the Partition Act. He is not entitled to do so when the suit has been decreed and the decree for possession is being executed. **Kali Kumar Mukherji v. Brahmananda Mukherji** 98

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in a suit for money—Minor—Court, sanction of—Decree directing immovable properties hypothecated for realisation of the money.	

The question whether any particular term of a petition of compromise incorporated in a decree, made under the power given by section 375 of the Code of Civil Procedure relates to the suit or is covered by its subject matter must be decided from the frame of the suit, the relief claimed, and the relief allowed by the decree on adjustment by lawful agreement. The mutual connection of the different parts of the relief granted by a consent decree is an important element for consideration in each case in deciding whether any portion of the relief is within the scope of the suit. No hard and fast rule can be laid down, each case being governed by its own facts.

A decree passed on a compromise cannot be regarded as *ultra vires* simply because it goes beyond the subject matter of the suit and contains other conditions; if these other conditions are the considerations for the compromise of the subject matter of the suit, they must be incorporated in the decree. **Gobinda Chandra Paul v. Dwarka Nath Paul** ... 492

Secs. 380, 410, <i>See</i> Security for costs ...	312
Sec. 443—Guardian and wards Act (XL of 1858), sec. 3—	
Appointment of guardian-ad-litem other than the certificated guardian.	

If a person, who was not a certificated guardian of the minor, was appointed a guardian-ad-litem at a time when Act XL of 1858 was in force:

Held, that the passing over of the certificated guardian was not more than an irregularity and would not of itself vitiate either the decree passed or a sale consequent upon such decree. **Jogeshwar Narain v. Lala**

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Compensation, apportionment of—Rent, abatement of—Contingency, value of, onus of proof, on whom.

In a proceeding for apportionment under the Land Acquisition Act, no abatement of rent can be made without the consent of the parties.

The compensation is to be apportioned between the parties according to the value of the interest which each of them parts with. The *zemindar* has a right to the fixed rent and the loss he sustained is of so much of his rent. Any other possible injury, such as the chance of the *putnidar* throwing up the land and its being diminished in value by what has been taken by Government, and still remaining as it did, liable to pay the same revenue, is not appreciable and cannot be taken into account. If there is no abatement of the rent and the *putnidar* continues liable to pay to the *zemindar* the same rent as he had to pay before, there would be nothing for which the *zemindar* is to receive compensation. The same rule applies to the case of lease in perpetuity with fixity of rent.

The burden of proof is on the *zemindar* to make out his claim and show as to the value of a particular contingency to him. **Satis Chunder**

Chattopadhyaya v Rai Jatindra Nath Chowdhury ... 284

“Competent to try such subsequent suit or the suit in which such issue has been subsequently raised” meaning of—Competency in regard to the whole or part of the subject matter of litigation—Competency of the original Court and not that of the appellate Court to be looked to, *See*

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Criminal Procedure Code , section 106— <i>Indian Penal Code (Act XLV of 1860)</i> , sections 379, 143, conviction under— <i>Recognizance to keep peace, where justifiable.</i>	

A conviction under section 143 or under section 379, Indian Penal Code, is not of itself sufficient to sustain an order under section 106, Criminal Procedure Code, unless it is clearly found that there was force employed, or that there were armed men present. **Chandra Bhusan Sen v. Emperor** ... 172

Criminal Procedure Code—(Contd.)

_____, *Sec. 106 (3)—Order for security by appellate Court—Conviction by Court other than of the description mentioned in the first paragraph of the section—Restriction of powers.*

An appellate Court has no power under section 106 (3) of the Code of Criminal Procedure to order security to be given by the accused person, where he was not tried and convicted by a Court of the description mentioned in the first paragraph of section 106.

Where a District Magistrate on appeal ordered a person who had been convicted by a Second-Class Magistrate to give security :

Held, the order was bad and must be set aside. **Momin Malita** ... 602
_____, *Secs. 110, 192, 529 (f), 112, 256, 540—Security, to be of good behaviour—Transfer of case—‘Any case’—Criminal Case—Irregularity—Proceedings to shew cause—Cross-examination after charge—Drawing up charge—Procedure in warrant cases—Witnesses called by Court—Cross-examination by parties—Restrictions to cross-examination—Bad livelihood.*

The District Magistrate has jurisdiction to transfer a case under section 110, Criminal Procedure Code, of which he has taken cognizance to any Subordinate Magistrate under section 192, Criminal Procedure Code. The words ‘any case’ in section 192 include a case under section 110, Criminal Procedure Code, and are not limited to ‘criminal cases’ only.

A transfer by a District Magistrate of such a case, even though held to be without jurisdiction would amount to a mere irregularity and cured by section 529 (f).

It is not necessary for a Magistrate to give a list of witnesses in a proceeding drawn up under section 110, Criminal Procedure Code.

Section 256, Criminal Procedure Code, has no application to a case under section 110. Even though by section 117, Criminal Procedure Code, the procedure prescribed for warrant cases is ‘as nearly as possible’ to be followed in cases of security for good behaviour, it does not follow that that gives a right to the accused person to further cross-examine the prosecution witnesses on entering into his defence, when he has once cross-examined them. The reason of the rule in section 256 is that in warrant cases, it is only when the charge is framed that the accused comes to know the definite charge which he is to meet ; but in cases of security for good behaviour, he knows what he is to meet as soon as the proceedings are drawn up.

Where witnesses are called by the appellate Court under section 540, Criminal Procedure Code, each party has the right to cross-examine them and the Court has no power to put any restrictions upon such cross-examination. **Chintamon Singh v. King Emperor** ... 177

_____, *Sec. 133—Nuisance, removal of—Conditional order—Claim of right to land—Bona fides of the claim, finding of—Limitation of claim—Magistrate, power of, to go into question of civil right—Jurisdiction.*

A Magistrate, in a proceeding under section 133 of the Code of Criminal Procedure, is not competent to decide the question as to whether the claim, set up by a person against whom a conditional order is made under the section, to the land in question is barred by limitation. He can only decide whether the claim is a *bona fide* one and in the event of his not holding that the claim is not a *bona fide* one, he should refrain from exercising jurisdiction. **Kamini Kumar Biswas v. The Emperor** ... 188

Criminal Procedure Code—(Contd.)

Sec. 145—Title—Possession—Handing over profits to party.
In a case under section 145, the Magistrate has no jurisdiction to enquire into the rights of parties. What he has got to look to is the fact of possession only.

A Magistrate in a case under sec. 145 passed the following order :—"I further order that if any fruit has been gathered on any of the said land attached by order of this Court, the proceeds of such fruit, *minus* expenses, shall be handed over to A ;"

Held, there is no authority in section 145 or any other section to justify such an order. **Arju Mea v. Arman Mea** 369

....., *Sec. 145, effect of an order under, if dispossession within the meaning of Sec. 9 See Specific Relief Act, Sec. 9* 547

....., *Sec. 164—Evidence of witnesses, See Misdirection* 246

....., *Sec. 192—Transfer of case to Subordinate Magistrate—Dismissal of case against one accused—Summons against other—Cognizance of case—Jurisdiction.*

Where a complaint was lodged against several accused person and the Magistrate after examining the complainant, issued summons against one of the accused only and transferred the case for trial to a Subordinate Magistrate :

Held, that the whole case of the complainant was transferred and the Subordinate Magistrate was quite competent, in discharging the accused before him, to order summons to issue for the attendance of some other accused person against whom the complaint seems to him to be well-founded.

Semble : Under section 192 of the Criminal Procedure Code the whole case must be transferred. **In re Azim Sheikh** 249

....., *Sec. 195—Sanction to prosecute—Penal Code (Act XLV of 1880), Secs. 196, 211—False case—False evidence.*

Sanction to prosecute under section 211, Indian Penal Code, should only be given where the case is a deliberately false one ; where the case brought is not false in substance, but is bolstered up by false evidence, the proper section to give sanction to prosecute under is section 196 of the Indian Penal Code. **Bholanath Dutt v. Hari Mohan Dutt** 169

....., *Secs. 195, 476—False information—Indian Penal Code, Sec. 211—Requisites of sanction—Criminal Procedure Code, Sec. 195 (4), See Sanction to prosecute* 373

....., *Sec. 196—Complaint—Sanction, See Indian Penal Code, Sec. 124A* 49

....., *Sec. 196—Local Government—Authority, who is to sign, See Indian Penal Code, Sec. 124A* 49

....., *Secs. 234, 235, 480 482, 537—Majoinder of charges—Drawing up of proceedings on the same day that offence is committed—Indian Penal Code (Act XLV of 1880), Secs. 178, 179—Refusing to take an oath—Refusing to answer questions—Oath, refusal to take.*

Where at the same trial an accused person is charged with two offences under Sec. 178 of Indian Penal Code and two offences under section 179 of the Indian Penal Code :

Criminal Procedure Code,—(Contd.)

Held, the case was not governed by Sec. 234 of the Criminal Procedure Code and there was no misjoinder. Moreover, the facts having all been admitted and the sentence passed being practically for only one of the offences, the accused was not prejudiced and the irregularity, if any, was cured by section 537 of the Criminal Procedure Code.

Section 482 does not require the Magistrate to draw up proceedings on the same day that the offence is committed. The section need not be read along with section 480 of the Criminal Procedure Code.

Quære. Whether a person who has once committed an offence under section 178 of the Indian Penal Code can be held to have committed a further offence under section 179 of the Indian Penal Code when he refuses to answer the question put to him. **Bepin Chandra Pal v. Emperor** ... 63

Secs 256, 528—Recalling of prosecution witnesses for cross-examination—Accused, right to recall—Transfer to some Magistrate other than the trying Magistrate—Judgment, passed by trying Magistrate—Trial de novo.

The accused in a criminal case has a right under section 256 of the code of Criminal Procedure, to have the witnesses for the prosecution recalled and cross-examined after charge.

Where a Magistrate declined to give the accused such an opportunity to recall and cross-examine the witnesses for the prosecution and proceeded to judgment in the case against the accused:

Held, that the conviction should be set aside and the trial held *de novo* by some other Magistrate of competent jurisdiction. **Gopal Sheikh v. The Emperor** ... 240

sections 350, 528—Transfer of Magistrate—Transfer of case—Trial, de novo.

Section 350 of the Criminal Procedure Code applies not only where a Magistrate is transferred and ceases to exercise jurisdiction at the revenue of the trial, but to all cases in which cases are transferred for whatever reason from the file of one Magistrate to that of another. **Moheah Chandra Saha v. King Emperor** ... 488

section 476—Order for prosecution—Indian Penal Code (Act XLV of 1860), section 211—False charge, laying of—Charge laid before the Police—Police report, directing charge as false—Judicial enquiry, order directing—Procedure.

A criminal proceeding was instituted by a person^a before the Police who reported the case to be false, and the matter coming on before a Magistrate empowered to dispose of Police reports, he made an order making over the case to another Magistrate for judicial inquiry. This Magistrate after holding a judicial inquiry as directed submitted a report, upon which the other Magistrate made an order to the following effect, *viz.*—

“The complainant's charge has been established to be false and hence no process shall be issued against the accused and the complainant shall be proceeded with under section 211, Indian Penal Code ” and upon prosecution of the complainant she was convicted under section 211 of the Penal Code:

Criminal Procedure Code,—(Contd.)

Held, that the offence of instituting a false complaint not having been committed before the Magistrate who ordered the prosecution of the petitioner, or brought to his notice in the course of judicial proceedings, the prosecution of the petitioner was bad and contrary to law and the proceedings must be quashed.

Held also, that the proper course, in such a case, should have been to direct the Police to lodge a complaint. **Abdul Rahman v. The Emperor** 371

—————, *See* 487—Presidency Magistrate—Power to try case of disobedience of his own order—Indian Penal Code (Act XLV of 1860), Sec. 188.

A Presidency Magistrate has no jurisdiction to try a case under section 188, Indian Penal Code, when the order which is alleged to have been disobeyed was an order which he had himself passed. **Leakut Hossein Khan v. Emperor** 70

—————, *See* 522—Restoration of house, where no criminal trespass attended by criminal force—Restoration of articles, not identified and when no conviction of theft, *See* Indian Penal Code, Sec. 448 175

—————, *See* 537 of the—Misdescription of articles on which the prosecution is based—Sanction, *See* Indian Penal Code, Sec. 124A 49

Criminal trespass—Belief in his own right, *See* Indian Penal Code, Sec. 447 238

Cross-examination, restriction as to—Criminal Procedure Code, Sec. 117, *See* Criminal Procedure Code, Secs. 110, 112, 117, 192, 256, 529(f). 540 177

Damages, for breach of contract—Suit for money due as price of trees—Suit for arrears of rent—Bengal Tenancy Act, Secs. 144, 193, Sch. III Art. 2, *See* Forest right 152

Darputnidars' lien, if superior to landlord's charge—Putni Regulation, Sec. 13 cl. (4)—Bengal Tenancy Act, Secs. 65, 165, *See* Landlord parting with his interest 652

Debt, meaning of—Application under Sec. 90 of Transfer of Property Act for money decree, *See* Succession Certificate Act, Sec. 4 658

———, mortgage, when extinguishes, *See* Mortgage, judgment on ... 1

———, when accrues due—Application under Sec. 90 of Transfer of Property Act for money decree, *See* Succession Certificate Act, Sec. 4 653

Debts and liabilities, meaning of, *See* Chota Nagpur Encumbered Estates Act, Sec. 3 (3) (c) 578

Debutter property, liability of—Mesne profits, *See* Shebait, decree against 574

Decision settling rent—Appeal

Held further : that as regards the limitation to enhancement, no appeal lay to the High Court as it was a "decision settling rent." **Shambhu Chandra Hazra v. Purna Chandra Pal** ... 103

Declaration, *Suit for*—Courts power to grant declaration subject to condition.

The granting of declaratory relief is discretionary with the Court. It can make a declaration in such a form as will grant the relief claimed and provide against an abuse of the right accorded. **Abdus Subban alias Mehral v. Kurban Ali and Umar Karim v. Hedaitulla** ... 433

Decree—Construction, *See* Shebait, decree against 514

Decree—(Contd.)

——, directing sale of nij-jote lands mortgaged—Saleability of jotes in execution, question as to—Mortgagor—Judgment debtor, <i>See</i> , Execution of mortgage decree	101
——, not giving relief against party, when binding, <i>See Res-judicata</i> ...	563
——, <i>not interpartes, evidence.</i>	

Although a decree may not be binding upon a defendant, it is admissible in evidence as against him, as an instance of a litigation in which the right in controversy was successfully asserted by the predecessor of the plaintiffs against a member of the family to which the defendant belonged. **Baleswar**

Bagarti v. Bhagirathi Dass ... 563

Decree-holders , minority of one of several—Extension of time, <i>See</i> Limitation Act, Secs. 7, 8	308
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—— on mortgage—Title to property, <i>See</i> Title of auction-purchaser when accrues	1
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—— against landlord, *if admissible in evidence against tenant*

A decree obtained by a person claiming to have a proprietary right to certain lands against other persons who set up similar proprietary right to the same lands, is admissible in evidence against the tenants of the latter who were not parties to the suit in which that decree was obtained and who do not claim independently of their landlords. **Tantardhari Sing v. Sundar**

Lal Missir 385

—— upon a Mortgage—*Construction—Future interest to date fixed for payment.*

When a decree directed payment of mortgage money and cost of the suit with future interest to the date fixed for payment :

Held, that the decree-holder was entitled to interest until realisation

Raja Gokuldas v. Sheth Ghasiram 233

Deed, construction of—*Intention*—“*Putra, pautradi, Santan*” meaning of—*Santan, meaning of—Maintenance deed, construction of.*

In construing a deed, the question is not what the parties to a deed may have intended to do by entering into the deed, but what is the meaning of the words used in that deed.

The words “*putra pautradi santan*” (sons, grandsons and the like issue) have a definite and well-ascertained meaning and mean all the heirs, male and female, though the two heirs expressly mentioned are the first two of the male heirs.

The word ‘*santan*’ means issue both male and female.

In a deed of maintenance, the grantor used the following words : “Upon your death, your sons, grandsons and the like issue, that is your male successors in the descending line shall continue to get the same :”

Held, that the words “your male successor in the descending line” are not explanatory, but are used in a restrictive sense to exclude female heirs.

Held, on a construction of the deed that upon the death of the wife leaving a daughter, no right to the maintenance allowance accrued to the husband. **Kishore Mohan Sanyal v. Shib Chander Lahiri** ... 291

Defeating or delaying creditors—Considerations for transfer separate—

Whole transfer if void, *See* Transfer of Property Act, Sec. 53 ... 586

Delay, a question of fact, *See* Pre-emption 318

Delivery of possession as against judgment-debtor—Third person in actual possession—Auction-purchaser, vendor of, suit by, *See* Limitation ... 640

Deposit of rent —Bengal Tenancy Act, Sec. 61, Sub-Sec. (2)—Onus, <i>See</i> Bengal Tenancy Act, Sch. III Art. 2(a)	251
—— to set aside sale—Purchaser of portion of occupancy holding, right of, to make deposit—Sale of holding for its own arrears—Transferability of holding, <i>See</i> Civil Procedure Code, Secs. 310A, 244	282
Discretion —Application for probate by executor's son, <i>See</i> Probate and Administration Act, Sec. 41	558
Dispossessed otherwise than in due course of law , meaning of—Criminal Procedure Code, Sec. 145, effect of an order under, if dispossession within the meaning of Sec. 9, <i>See</i> Specific Relief Act, Sec. 9	547
Dispossession by third person, if renunciation of relation, <i>See</i> Landlord and tenant, denial of relation	648
Document , construction of—Mortgage or charge, <i>See</i> Transfer of Property Act, Secs. 58, 59, 100	492
Ejectment —Onus—Tenure-holder—Tenure, non-permanent, if transferable—Transfer of Property Act (IV of 1882), Sec. 2, effect of—Bengal Tenancy Act (VIII of 1885), Sec. 11.	

In a suit in ejectment, where the defence sets up a tenure by right of purchase from the former tenant, if the plaintiff has proved that he is the owner of the land, it lies upon the defendant to make out that he is a tenure-holder and is entitled to remain thereon.

The provisions of the Transfer of Property Act do not apply to a tenancy created before the Act came into force. A non-permanent tenure created before the passing of the Transfer of Property Act is not transferable.

Semle: Section 11 of the Bengal Tenancy Act imports that non-permanent tenures are not to be regarded as transferable. **Hiramoti**

Dassya v. Annoda Prosad Ghosh	558
——, plaintiff suing in, not affected by defendant's title—Suit, frame of—Multifariousness, <i>See</i> Tanki-tenure	460
——, Suit for—Central Provinces Rent Law, Sec. 43—Occupancy holding, transfer of part of, <i>See</i> Jurisdiction, when exclusive	499
——, Suit for—Cultivating raiyat—Tenure holder holding some land as a raiyat—Suit for ejectment, <i>See</i> Bengal Tenancy Act, Sec. 21	475
——, <i>Suit for—Onus of proof—Suit for possession—Plaintiff to prove what.</i>	

The plaintiff in an action for ejectment must prove possession, actual or constructive, within 12 years before suit. If the condition of the disputed property was such that it did not admit of actual occupation, the presumption is that legal possession continued with the rightful owner, and it is sufficient for the plaintiff to prove either that the property continued in such state within 12 years of the suit or that the condition continued up to a date so near the 12 years that the natural and probable inference is that the condition of the property was similar up to a date within 12 years of the suit. If this is established by the plaintiff, the presumption would be that the possession of the plaintiff also continued within 12 years of the suit. This presumption, however, is rebuttable and the defendant may show that he has been actual occupation of the property or of any portion thereof for more than 12 years before suit. If the presumption is thus rebutted and the adverse possession of the defendant is proved in respect of any portion of the property, the suit of the plaintiff must fail to that extent.

Ejectment,—(Contd.)

Where the evidence of possession is equally unsatisfactory on both sides, the presumption may be made that possession was with the true owner.

Mirza Shamsher Bahadur v. Kunj Behari Lall ...	414
<i>—, suit for—landlord and tenant—Denial of relation and setting up third party as landlord in a previous rent suit by some of the landlords—Joint lessors, putting an end to tenancy—Transfer of Property Act (IV of 1882), section 111—Intention to determine.</i>	

A denial of the existence of relation of landlord and tenant and setting up a third party as landlord in a previous rent suit by some of the landlords amounts to renunciation of all by the tenant. The latter, therefore, incurs a liability to have his tenancy forfeited.

Though in England any joint tenant may put an end to his demise so far as it operates on his own shares, whether his companions join him in putting an end to the whole lease or not, yet according to the Indian decisions the relation created by the several joint landlords continues until there exists a new and complete volition to change it. This is the law when the *khas* possession is the relief asked for against the tenant but not in cases of trespassers and tenants when *khas* possession is not sought for.

Where the relation of joint landlords continues, the tenancy of the lessees cannot be put an end to except by all the lessees acting together.

Under section 111 of the Transfer of Property Act, all the lessees must show their intention to determine the lease before they can succeed in a suit for ejectment. **Bhikharee Ram Mohoori v. Dhakeswar Pershad**

Narain Singh ...	483
<i>—, suit for—Tenancies of homestead land—Tenancy created before the transfer of Property Act—Abandonment or surrender—Notice to quit, if necessary.</i>	

Previous to the passing of the Transfer of Property Act, tenancies of homestead land created for the purpose of habitation were not transferable except by custom or usage.

Where there has been an implied surrender of the land, and the former tenant has abandoned the land and transferred it to another and no longer pays rent for it, the landlord is justified in regarding the conduct of the former tenant as amounting to an implied surrender and he is now entitled to take direct possession of it. **Hanuman Prosad Singh v. Deo Charan**

Singh ...	309
<i>—, suit for—Previous suits for rent and enhancement—Estoppel, See Bengal Rent Recovery Act, Sec. 16</i> ... 191	
<i>—, suit for—Encumbrance, avoidance of—Notice to quit, if necessary, See Bengal Rent Recovery Act, Sec. 16</i> ... 191	
<i>—, suit for, by landlord—Non-occupying tenant not a necessary party, See Abandonment</i> ... 72	
<i>—, suit for—Notice to quit—Tenant-at-will—Agricultural holding—Transfer of Property Act (IV of 1882), Sec. 108, cl. (j)—Trespasser, notice addressed to tenant as, if legal.</i>	

The incident of non-transferability was common to tenancies from year to year of homestead lands and agricultural lands, created before the passing of the Transfer of Property Act in the absence of a custom to the contrary.

Ejectment,—(Contd.)

A notice addressed to a tenant, not as a tenant but as a trespasser, giving him six months' time to quit, even if the tenancy was created after the passing of the Transfer of Property Act, is a good notice and the defendant is bound to quit the land in accordance with such notice. **Ram Charan**

Naskar v. Hari Charan Guha ... 107

Encumbrance, avoidance of—Suit for ejectment—Previous suits for rent and enhancement—Estoppel, *See* Bengal Rent Recovery Act, Sec. 16 ... 191

———, interest of person acquiring the share of the estate before default made—Interest created after default and before the date of revenue sale—Purchaser of share, *See* Revenue Sale Law, Secs. 13, 14, 53, 54 ... 1

——— Previous mortgage—Revenue Sale, *See* Revenue Sale Law, Secs. 13, 14, 53, 54 ... 1

Enhancement, limitation to—Appeal, *See* Decision settling rent ... 103

———, right of—Contract of tenancy, *See* Maurasidar ... 284

Entry, alteration of—Record of rights—Final publication—Settlement Officer, jurisdiction of, *See* Bengal Tenancy Act, Secs. 105, 106, 108, 109A (3) ... 103

Equitable rights, *See* Title of auction-purchaser when accrues ... 1

Equity—Interests of the mortgagor and mortgagee united in the same person—Intention—Mortgage lien kept alive, *See* Mortgagee-purchaser, rights of ... 1

——— *Minor—Principal and Agent—Accounts—Advances made by agent—Benefit of minor—Application of advances.*

He who seeks equity must do equity.

When a minor on attaining majority comes to Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian, the only person to whom he could make them as representing the minor—and this have been applied for the minor's benefit, the agent ought to be allowed those advances in taking the account. **Surendra Nath Sarkar v. Atul**

Chandra Roy ... 87

Estoppel—Purchaser of the interest of co-parcener in execution of money decree obtained in partition suit—Alienation by co-parcener when joint—Knowledge, *See* Joint Hindu family ... 644

——— Previous suit for possession—Account filed therein—Recovery of costs thereon, *See* Redemption ... 215

——— Purchaser of a tenure—Suit for rent—Suit for enhancement of rent—Encumbrance—Subsequent suit for ejectment, *See* Bengal Rent Recovery Act, Sec. 16 ... 191

———, transferor—Subsequent acquisition of rights—Representation, *See* Transfer of Property Act, Sec. 43 ... 381

——— *Silence.*

When silence is of such a character and under such circumstances that it would be a fraud upon the other party, for the party which has kept silence to deny what his silence has induced, it will operate as an estoppel.

Jakhomull Mehera v. Saroda Prosad Dey ... 604

Evidence —Decision of Revenue Court, <i>See Res judicata</i>	202
——— of witnesses taken under Sec. 164 of the Criminal Procedure Code, how to be treated, <i>See</i> Misdirection	246
———, judge's opinion on, <i>See</i> Misdirection	246
——— Proprietary right—Landlord and Tenant, <i>See</i> Decree against landlord	384
Evidence Act, Secs. 13, 65, 66(2) — <i>Secondary evidence—Judgments not inter partes, admissibility of.</i>	

In a suit for *khas* possession on the ground that the defendants were trespassers on the death of their ancestor, the grantee, the plaintiff relied on office copies of grants kept in the course of business of the grantor's sherista :

Held, that no notice to the defendants to produce the original was necessary to render secondary evidence admissible as the defendant from the nature of the case, must have known, that they would be required to produce the originals.

Where judgments not *inter partes* were filed to show that similar grants were resumed by the grantor or his heirs on the death of the grantee :

Held, they are admissible in evidence under the provisions of section 13 of the Evidence Act.

Board's letter dated the 26th November 1792 showing that jaigirs are resumable on the death of the grantee is inadmissible in evidence. **Syed**

Mahammad Khan v. Maharaja Nam Narain Singh Bahadur 90

———, *Sec. 90—Presumption how weakened.*

The Court may presume the genuineness of a document more than 30 years old, if it be produced from proper custody, but the effect of the presumption may be weakened by circumstances which tend to raise doubts as to its authenticity. **Madan Mohan Gossain v. Kumar Rameswar**

Malia 615

———, *Sec. 114 of the—Presumption—Misdescription of articles on which the prosecution is based—Criminal Procedure Code, Sec. 537,*

See Indian Penal Code, Sec. 124A 49

Execution proceedings—Suit—Sale by mortgagee of property not mortgaged, validity of, where to be questioned.

Where a puisne mortgagee, who was not made a party to the suit of the prior mortgagee, instead of proceeding against the property sold in execution of the decree of the prior mortgagee, proceeded against other properties of the mortgagor and sold them :

Held, that it was a matter to be complained of and (if wrong) remedied in execution proceedings and not by a separate suit. **Jogeshwar Narain**

v. Lala Mooraidhar 270

Execution of decree—Limitation—Period of limitation, when begins to run—Original or appellate decree—Code of Civil Procedure (Act XIV of 1882), Sec. 230—Decree modifying original decree.

Per Rampini J.—When an application is made to execute the decree passed on appeal, modifying the decree made in the Court of first instance, limitation begins to run from the date of the decree in appeal and not from the decree of the first Court, as it is not the decree sought to be enforced.

Per Sharfuddin J.—It is only the last decree that can be executed, and limitation would begin to run from the date of the appellate decree and not from that of the original decree.

Execution of decree,—(Contd.)

In cases where the original decree has either been set aside or modified that decree ceases to exist, and for the purposes of limitation, the date of the appellate decree should be taken into consideration, not the date of the decree that has ceased to exist.

In cases where the Court of appeal affirms the original decree, the general rule is to be followed and the date of the appellate decree affirming the original one is the date from which the period of limitation is counted.

Mahomed Medhi Bella v. Mohini Kanta Saha Chowdhury ... 305

—, application for—Striking off—Fresh application, *See*

Mesne profits, application to determine ... 301

Execution of mortgage decree—Decree directing sale of *nij jote* lands mortgaged—Mortgagor-judgment-debtor, if competent to raise the question of the saleability of the *jotes*, in execution—Saleability or otherwise of *nij jote* lands, onus of proof of—Regulation III of 1872, Sec. 11—Sonthal Pergunnahs Regulations—Settlement Court, decisions of—Suit, maintainability of.

Where a mortgage decree distinctly provides for the sale of certain *nij jote* lands mortgaged and directs that the mortgage debt must be realized, in the first instance, by the sale of the mortgaged property, it is not open to the mortgagor-judgment-debtor to object to the execution of the decree on the ground that the *jotes* are not saleable.

The *onus* is not on the decree holder, in such a case, even if it were open to the judgment-debtor to raise the question of the saleability of the *jotes* to shew that the *jotes* are saleable, but on the judgment-debtor to prove that the *jotes* are not saleable.

In the absence of a decision of any Settlement Court or of a decision by any Civil Court on the question of the transferability of those *jotes*, a suit for the sale of such *jotes* mortgaged does lie in the Civil Court. **Kartik**

Sahu v. Nilambar Singh ... 101

Execution proceedings—Shebait, personal decree against—Claim to attached property on behalf of idol, when triable, *See* Civil Procedure Code, Sec. 244 ... 537

Execution Sale—Voluntary abandonment, *See* Abandonment ... 72

Exparte entry in the order-sheet, evidentiary value of, as against landlord—Bengal Tenancy Act, Sec. 61, *See* Bengal Tenancy Act, Sch.

III, Art. 2 (A) ... 251

— order, setting aside of—Insolvency proceeding—Review, *See* Civil Procedure Code, Secs. 108, 350, 623 ... 268

Explanation of Magistrate, *See* Judgment, supplement to ... 238

False Charge, laying of, before the police—Police report directing charge as false—Judicial enquiry, order directing, by Magistrate—Prosecution under Sec. 211 of the Indian Penal Code—Procedure, *See* Criminal Procedure Code, Sec. 476 ... 371

False information—Indian Penal Code, Sec. 211—Criminal Procedure Code, Secs. 195, 476—Sanction, requisites of—Criminal Procedure Code, Sec. 195 (4), *See* Sanction to prosecute ... 373

Female-heir with limited interest—Alienation—Reversioner—Legal necessity.

Where a person claims title under a conveyance from a woman who is a limited owner and seeks to enforce his right against the reversioner, he must prove, *first* that the conveyance is genuine, *secondly* that the

Female-heir,—(Contd.)

lady had full knowledge and *thirdly*, either that the alienation was for necessity or that he was satisfied of necessity upon reasonable enquiry. **Raja Rai Bhagwat Dayal Singh v. Debi Dayal Sahu** ...

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Finding of fact, concurrent, See Practice ...

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First information Report, when to be read out to Jury, See Charge to

Jury

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Fishery right, if included within the definition of land, See Land

Acquisition Act

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Forfeiture—Landlord and tenant—Non-transferable holding—Tenant remaining in occupation as vendee's under-raiyat—Refusal to pay rent—

Assertion of right to transfer, *See Bengal Tenancy Act, Sec. 87* ...

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Forest right, lease of—Suit for money due as price of trees—Damages for breach of contract—Suit for arrears of rent—Bengal Tenancy Act (VIII of 1885), Secs. 144, 183, Sch. III, Art. 2—Grant to cut timber of a certain size, of limited rights, construction of.

A grant of the right to fell timber of a particular class and specified size during a defined period of time, though extremely restricted in its scope, which prohibited the lessee from doing any damages to the *bankar mahal i. e.* to the forest, and imposed upon the lessee a condition to notify to the Court any occurrence which might happen, and though it obviously granted no interest in the soil itself, was obviously a grant of the most valuable of the forest rights; it cannot be regarded as a sale of timber.

A grant of a fishery right or right of pasturage or the like may be made independently of an interest in land.

A grant of the trees as distinct from the land in which the grantor reserves every forest right except the one which is granted, is nevertheless the grant of a forest right within the meaning of section 193 of the Bengal Tenancy Act; and a suit for the recovery of money payable in respect of such forest rights is governed by the three years' rule of limitation laid down in Schedule III, Art. 2, Cl. (b) of the Act.

The provisions of the Bengal Tenancy Act applicable to suits for the recovery of arrears of rent are, having regard to the phraseology of section 193 of the Act, designedly made applicable to suits for the recovery of sums that are not rent; and money payable in respect of forest rights is not rent within the meaning of section 3 (5) of the Act.

Although standing timber is movable property within the meaning of section 3 of the Indian Registration Act, yet under section 3, clause 25 and section 4 of the General Clauses Act, of 1897, standing timber is immovable property within the meaning of the Civil Procedure Code.

Growing trees may be regarded as part of the soil and consequently immovable property.

But where under a contract the grantee has no right to the soil, takes no interest in the land and obtains a right to the trees with a view to fell them immediately or within a reasonable time, without any stipulation for the beneficial use of the soil but with a license to enter and take the trees away, the transfer may be regarded as one of movables. **Abdulullah**

Sarkar v. Asraf Ali Mandal ...

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Ganja , illegal possession of, outside licensed place—Master and servant, liability of, <i>See</i> Bengal Excise Act, Secs. 53, 59, 61	377
Gardens , planting, <i>See</i> Grants, construction of	...	...	90
Gift , testamentary, of immovable property, to a Hindu widow—"Malik" effect of the word—Interpretation in such a case, principle of, <i>See</i> Hindu Law, Testamentary gift	...	...	181
—, validity of—Murz-ul-mout—Right test to be applied, <i>See</i> Mahomedan Law	...	...	122
Good behaviour , security to be of—Proceedings to show cause—Cross-examination, further—Drawing up charge—Criminal Procedure Code, Secs. 110, 117, 256, <i>See</i> Criminal Procedure Code, Secs. 110, 112, 117, 192, 256, 529 (f), 540	...	...	177
—, security to be of—Transfer of case—"Any case"—Criminal case—Irregularity—Criminal Procedure Code, Secs. 110, 192, 529 (f), <i>See</i> Criminal Procedure Code, Secs. 110, 112, 117, 192, 256, 529 (f), 540	...	...	177
Government revenue , enhancement of—Mortgage deed, construction of, <i>See</i> Redemption	...	...	215
Governor-General's authority to place territory within jurisdiction of High Court—Sambalpur, High Court's jurisdiction over—Statute 28 and 29 Vict. C. 15, Sec. 3—Indian High Courts Act, 1861, (24 and 25 Vict. C. 104.)			
The Governor-General in Council has authority, not only to transfer any territory from the jurisdiction of one High Court to that of another, but also to place within the jurisdiction of any High Court, entirely or partially, territory not originally included therein, even though in the latter event, such place was not part of the Presidency, place or places for which the High Court had already been established. Baleswar Bagarti v. Bhagirathi Dass			
	...	...	563
Grants, Construction of.			
Where a grant of land was made as a present for the purpose of planting a garden and another was made "subject to faithful service" and the documents of grants do not contain any words expressly limiting the grants to the life of the grantee nor making them descendible to the heirs of the grantee :			
<i>Held</i> , they convey only life grants. Syed Mahammad Khan v. Maharaja Nam Narain Singh Bahadur			
	...	...	90
Grant to cut timber of certain size—Limited rights—Construction, <i>See</i> Forest right	...	...	152
Gribi estate , creation of—Conduct of parties, <i>See</i> Putni Regulation, Sec. 13 cl. (4)	...	...	604
Growing trees—Immovable property, <i>See</i> Forest right	...	...	152
Guardian ad-litem , appointment of, other than the certificated guardian—Guardian and Wards Act, Sec. 3, <i>See</i> Civil Procedure Code, Sec. 443	...	...	270
Gun , temporary possession, without license, if possession, <i>See</i> Indian Arms Act, Sec. 19(f)	...	...	242
High Court, Letters Patent, 1865, clause 12; whether an objection that no leave was taken under clause 12 can be waived—Letters Patent, 1865, clause 12—Registrar, power of, to grant leave under clause 12 of the Letters Patent.			
The Registrar has no power to grant leave under clause 12 of the Letters Patent, 1865.			

High Court,—(Contd.)

If the defendant is served and takes any step in the action except moving to set aside the service of writ on him he waives the objection of want of jurisdiction on the ground that no leave under clause 12 was properly obtained and cannot be heard. **A. J. King v. Secretary of State for India in Council** 441

Hindu Law—Mitakshara—Joint Hindu family—Mortgage, suit to enforce—Liability of members, personal or otherwise—Limitation.

A mortgage bond was executed by two brothers, members of a joint Hindu family governed by the Mitakshara Law. On the death of one of the brothers, a suit was brought, more than six years after the due date of the bond, to enforce the bond against the property of all the members of the joint family including the mortgagor who was alive, the sons and grandsons of the deceased mortgagor and the son of the surviving mortgagor :

Held, that the mortgagee is entitled only to a mortgage decree against the mortgagor who is alive, that he has a right only to a personal decree against the other defendants and that the suit, brought more than six years after the due date of the bond, is barred by limitation as against these defendants other than the mortgagor. **Bhagawat N. Chowdhury v. Suba Lal Jha** 195

————— **Testamentary gift of immovable property to a Hindu widow—"Malik," effect of the word—Interpretation in such a case, principle of.**

Where the question was whether a Hindu widow acquired a right to alienate the property (immovable) in suit under a deed of gift or testamentary disposition of her late husband, wherein the word used was '*malik wa khudikhtiyar*,' their Lordships held that in order to cut down the full proprietary rights that the word (*malik*) imports, something must be found in the context to qualify it and that the fact that the donee was a woman and a widow did not suffice to displace the presumption of absolute ownership implied in the word *malik*.

The donee in the case of **Lalit Mohun Singh Roy v. Ohukhun Lal Roy** was a man, but the principles of interpretation laid down in that case were of general application. **Musammat Surajmani v. Rabi Nath Ojha** ... 131

Hindu widow—Testamentary gift of immoveable property—"Malik"—

Effect of the word—Interpretation in such a case, principle of, *See*

Hindu Law 131

Holding, non-transferable, mortgage of—Landlord—Mortgagee—Mortgagor,

See Abandonment 72

—————, raiyati, non-transferable—Transfer—Vendee's under-raiyat—

Possession, suit for, maintainability of, *See* Bengal Tenancy Act, Sec. 87 78

—————, separate—Aggregate area—Aggregate rent—Single suit for rent,

maintainability of, *See* Bengal Tenancy Act, Sec. 148 96

Homestead lands—Tenancy from year to year—Non-transferability, *See*

Ejectment, suit for 107

Homestead land, transferability of—Tenancy created before the Transfer of

Property Act—Implied surrender—Notice to quit, if necessary, *See*

Ejectment, suit for 309

House-trespass—Entry into a house on a bona fide claim, *See* Indian

Penal Code, Sec. 448 175

Incumbrance—Proper service of notice, *See* Bengal Tenancy Act,
 Sec. 167 262

Indian Arms Act, Sec. 19 (f).—*Possession of a gun without license—Possession, meaning of—Possession, temporary, if possession within the meaning of the Act.*

The mere possession of a gun is not punishable under the provisions of section 19 (f) of the Indian Arms Act; it is possession, contrary to the provisions of section 14 of the Act, that is punishable.

The temporary possession of a gun is not the possession contemplated by section 14 of the Act. **Prabhat Chandra Chowdhuri v. The Emperor** 242

The Indian Extradition Act, Sec. 8.—*Warrant issued by Political Agent, endorsement in—Jurisdiction of Magistrate to release arrested person on bail, where no such endorsement.*

Where a person was arrested upon a warrant issued by a Political Agent under the Indian Extradition Act, and is placed before a Magistrate, and such Magistrate passed an order releasing him on bail and directing him to appear before the Political Agent on a certain date, although there was no endorsement on the warrant, giving the Magistrate power to pass such an order :

Held, that in the absence of such an endorsement under section 8 of the Act, the Magistrate had no authority to pass such an order. **Raj Kumar**

Dutt v. Tothal Sijo 171

Indian High Court's Act, 1861, Sec. Governor-General's authority to place 563

Indian Penal Code, Secs. 99, 147.—*Right of private defence—Time to have recourse to the public authorities—Person in possession of property—Rioting.*

There is no right of private defence where there is time to have recourse to the public authorities.

Where both parties arm themselves for a fight to enforce their right or supposed right and deliberately engage in very large numbers in a pitched battle, killing one man and wounding others, the questions as to who began the attack and who were in possession of the property, do not arise.

The law does not delegate to any private individual the functions of those public officers who are specially charged with the protection of life and property.

No one has a right to assemble in large numbers and court an attack by an opposing party. In such a case the right of private defence does not exist. **Kabiruddin v. King-Emperor** 359

—, **Sec. 124A—Criminal Procedure Code (Act V of 1898), Sec. 196**
—Complaint—Sanction—Examination of Complainant—Local Government—Presumption—Evidence Act (1 of 1872), Sec. 114—Privileges—Proceedings of Court of Justice—Printing Presses and Newspapers Act (XXV of 1867), Sec. 7—Declaration by Printer—Liability of Printer.

Section 196 of the Criminal Procedure Code requires that no case under section 124A of the Indian Penal Code shall be taken cognizance of except upon complaint made with the authority of the Local Government. Where the letter of authority did not specify the name of the accused but he was indicated from the first and his name was supplied at the commencement of the Police Court proceedings, *held* it was a sufficient compliance with the section.

The person who signs the letter of authority is not the complainant and it is not necessary to take his examination under the law. The person who armed with the

Indian Penal Code,—(Contd.)

authority makes the application to the Court for the apprehension of the accused is the complainant and his examination is to be taken. A Presidency Magistrate need not at this stage administer an oath to the complainant nor reduce his complaint into writing.

The authority under section 196 need not in the case of 'Local Government' be signed personally by the Lieutenant-Governor, it is enough if it is signed by one of his accredited and Gazetted Officers.

It must be presumed that all official acts have been duly performed and section 114 of the Evidence Act amply supplies all omissions in the method of communication of the sanction to the prosecuting officer and the Magistrate, where the sanctions as they originally stood contained a misdescription of the articles on which the prosecution was based and this was rectified by a subsequent sanction filed in course of the trial, *held* the petitioner was not prejudiced and the defect was cured by section 537 of the Criminal Procedure Code.

A newspaper was prosecuted for sedition. One article only was put in at the trial. The prosecution intended to rely upon other articles also in support of their case and had them translated and the translations supplied to the accused in that case. They were, however, never brought upon the record in that case. Where these translations were reprinted by another newspaper, *held* that the republication was not of any proceedings of a Court of Justice and not, therefore, privileged. In a case like this, the Court shall look into the state of the country and judge whether the republication was *bonafide* or not.

The person who subscribes to the declaration under the Printing Presses and Newspapers Act must be presumed under section 7 to be cognizant of all that he was printing and publishing and in the absence of any evidence to the contrary, his liability in the matter cannot be gainsaid. **Apurba**

Krishna Bese v. Emperor	...	...	...	49
—————, Secs. 143, 379, convictions under—Recognizance to keep peace, where justifiable, <i>See</i> Criminal Procedure Code, Sec. 106				172
—————, Secs. 178, 179, charges under—Refusing to take oath and answer questions—Misjoinder—Criminal Procedure Code, Secs. 234, 537, <i>See</i> Criminal Procedure Code, Secs. 234, 235, 480, 482, 537				68
—————, Sec. 188—Presidency Magistrate's power to try case of disobedience of his own order, <i>See</i> Criminal Procedure Code, Sec. 487	...	...	...	70
—————, Secs. 196, 211, <i>See</i> Criminal Procedure Code, Sec. 195				169
—————, Sec. 211, prosecution under—False charge, laying of, before the police—Police report directing charge as false—Judicial enquiry, order directing, by Magistrate—Procedure, <i>See</i> Criminal Procedure Code, Sec. 476	...	...	...	371
—————, Sec. 211—False information—Criminal Procedure Code, Secs. 195, 476—Sanction, requisites of, <i>See</i> Sanction to prosecute				373
—————, Secs. 417, 511—Attempt at cheating—False representation to pleader—Damage or harm in mind, reputation—Complainant, position of.				

Where A falsely representing himself to be a member of the firm of B, which firm were clients of a pleader C, went to the pleader and instructed him to write

Indian Penal Code,—(Contd.)

a letter on behalf of B, cancelling a certain contract and where C, wrote the letter but instead of despatching it to the addressee sent it to B's shop where the fraud was discovered :

Held, the despatch of the letter would have caused injury to the pleader in mind and reputation, he would certainly have been likely to lose reputation, and perhaps business, if it appeared that he had been negligent and had been readily deceived.

Held, therefore, that A was rightly convicted of attempt at cheating.

The prosecutor in all Criminal cases is really the Crown; the complainant merely sets the machinery of the Court in motion. In a case of cheating, it is not necessary that the complainant should have been the person deceived. **Mahadeo Lal v. King Emperor** ... 375
Sec. 447—Claim of right.

Where the accused acts on a belief of his own right, he cannot be held guilty of criminal trespass. **Jurakhn Singh v. King Emperor** ... 238

Sec. 448—Criminal Procedure Code (Act V of 1898), Sec. 522—Entry into a house on a bonafide claim not criminal house-trespass—Restoration of articles, not identified, and where no conviction for theft, illegal—Where criminal house-trespass is not attended by criminal force, restoration of house to complainant's possession illegal.

Where in the absence of the complainant, certain persons took possession of her house and established there a boy, alleged to be the adopted son of the complainant's father, and the complainant thereafter lodged a complaint of criminal house-trespass and theft, and the Deputy Magistrate convicted the accused of criminal house-trespass, but not of theft, holding that the articles taken away could not be satisfactorily identified, and although the accused claimed the articles as their own, ordered to make over the articles as well as possession of the house to the complainant:

Held—That the case is one, not of criminal but of civil trespass; that the Deputy Magistrate should not have ordered the articles to be delivered to the complainant : and further that the provisions of Sec. 522, Criminal Procedure Code, do not warrant the passing of an order delivering possession of the house to the complainant because the accused were not convicted of any offence attended by Criminal force. **Saita Biswal v. Dochhi Stri** ... 175

Indian Registration Act, sections 17, 21, 49—Attorney, power of, to create a charge on immovable property.

Where a power of a attorney was executed by A in favour of B to enable B to recover the rents and profits of the properties of which A was the administrator, in order to pay off an amount advanced by B to A as such administrator :

Held, that inasmuch as the document was entered in Book IV instead of Book I, it was not registered according to the provisions of the Registration Act, and therefore could not affect immovable property. **Srimati Indra Bibi v. Jain Sirdar Ahiri** ... 149

Injustice—Court of justice—Court's acts or oversights at the instance of party against whom relief sought, *See* Limitation Act, Sec. 14 ... 59

Insolvency proceeding—*Ex parte* order, setting aside of, *See* Civil Procedure Code, Secs. 108, 350, 623 ... 268

Intention —Mortgage lien kept alive, <i>See</i> Mortgagee-purchaser, rights of ...	1
——— to determine tenancy—Joint landlords—Transfer of Property Act, Sec. 111, <i>See</i> Ejectment, suit for ...	483
Interest —Date fixed for payment—Realization, <i>See</i> Decree upon a mortgage ...	233
———, rate of—Civil Procedure Code, Sec. 211, <i>See</i> Mesne profits ...	197
Interpretation , principle of, in case of gift to Hindu widow—"Malik," effect of, <i>See</i> Hindu Law ...	131
Interrogatory , failure to answer—Civil Procedure Code, Sec. 136, scope of—Discretion—Defence when to be struck off.	

Section 136 of the Code of Civil Procedure is based upon Order 31, Rule 21 of the Supreme Courts in England. It renders the defendant liable to have his defence struck out upon failure to answer as interrogatory. It does not make it obligatory upon the Court to strike out the defence under all circumstances whatever.

If there is obstinacy or contumacy on the part of the defendants or a wilful attempt to disregard the order of the Court, an order under section 136 of the Civil Procedure Code is appropriate. **Banshi Singh v. Palit**

Singh ... 295

Irregularity —Appointment of guardian <i>ad litem</i> other than the certificated guardian—Decree and sale if vitiated, <i>See</i> Civil Procedure Code, Sec. 443 ...	270
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Joint family , member of, when can buy—Partition Act, Sec. 4—Decree for partition, <i>See</i> Civil Procedure Code, Sec. 331 ...	98
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Joint Hindu family , members of, rent due to—Co-owners, suit by some of, maintainability of—Addition of parties after limitation period—Claim joint and indivisible—Limitation Act, Sec. 22.	
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When rent is due to the members of a joint Hindu family, it is not open to the *karta* alone to maintain a suit for rent without joining the other members either as plaintiffs or as defendants, except when the tenant has dealt with such *karta* as sole landlord.

When the co-owner landlords were not unwilling to join as co-plaintiffs but did so with the utmost readiness as soon as objection was taken by the tenant defendants, they should have been joined as plaintiffs in the first instance and if they are brought on the record after the expiry of the period of limitation, their claim is barred by limitation and the entire claim is barred as the claim was joint and indivisible. **Mir Tapurah Hossein**

v. Gopi Narayan ... 251

——— <i>Hindu Law, Mitakshara</i> —Co-parcener when joint alienating—Mortgagee, right of—Partition—Estoppel.	
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During the subsistence of co-parcenership, a co-parcener in a joint Hindu family governed by the Mitakshara Law cannot alienate his own share of the family property.

On the severance of the family by the decree in a partition suit, the mortgage which was in the nature of an inchoate right became perfected as regards the share of the mortgagor.

Bemle : The co-parceners A and B who purchased the interest of another co-parcener C under the money decree obtained in a partition suit with full knowledge of the mortgage in favour of the plaintiff by C are

Joint Hindu family—(Contd.)

estopped from contesting the right the plaintiff had. <i>Parsidh Narain Singh v. Janki Singh</i>	644
————— Mortgage, suit to enforce—Liability of members, personal or otherwise, <i>See Hindu Law—Mitakshara</i>	195
Joint family debt , nature of, if to appear on the face of the bond, <i>See Succession Certificate Act, Sec. 4</i>	658
Joint Landlords —Denial of relation by tenant—Tenancy how can be put an end to—Transfer of Property Act, Sec. 111—Intention to determine, <i>See Ejectment, suit for</i>	483
Jote and Khamar lands —Mesne profits, assessment, principle of—Decree-holder not a cultivator—Deduction to be made in case of Khamar lands, <i>See Mesne profits</i>	197
Judgment , if void—Consent of parties to jurisdiction—Waiver or acquiescence, <i>See Jurisdiction</i>	152
Judge's opinion on evidence , <i>See Misdirection</i>	246
———— opinion on facts—Jury sole Judge of fact, <i>See Charge to Jury</i>	599
Judge of Court of Small Causes , if means and includes Munsiffs and Judicial Officers vested with Small Cause Court power, <i>See Provincial Small Cause Court Act, Sch. II clause 8</i>	407
Judgments not interparte , admissibility of, <i>See Evidence Act, Secs. 13, 65, 66(2)</i>	90
Judgment , admission in the, when a party can question, <i>See Admission</i>	414
————, written when the judge ceased to exercise jurisdiction in the place, if valid, <i>See Civil Procedure Code, Sec. 199</i>	666
————, <i>supplement to—Explanation of Magistrate.</i>	

A Magistrate cannot supplement his judgment by his explanation to the superior Court. If there are no material findings in the judgment, the defect cannot be cured by the Magistrate's explanation. *Jurakhan Singh v. King Emperor* ... 333

Judicial Proceedings—Registration, *See Registration Act, Sec. 17* ... 492

Jungle and hilly lands—*Presumption—Possession, sufficiency and effectiveness of.*

In respect of jungle and hilly lands possession must be presumed to be with the rightful owner.

The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests,—all these matters greatly varying, under various conditions, are to be taken into account in determining the sufficiency and effectiveness of possession. *Mirza Shamsah Bahadur v. Kunj Behari Lal* ... 414

Jurisdiction of Magistrate to release arrested person on bail, where no endorsement on warrant issued by Political Agent, *See The Indian Extradition Act, Sec. 8*
 171 |

———— of Civil Court—Assessment, legality of, may be questioned—Principle of assessment, *See Bengal Municipal Act, Secs. 85, 87(d), 92, 113, 114, 116*
 631 |

————, of subordinate Magistrate—Transfer of a case to subordinate Magistrate—Dismissal of case against one accused—Issue of summons by the subordinate Magistrate against other, *See Criminal Procedure Code, Sec. 192*
 249 |

Jurisdiction, Central Provinces Rent Law (Act IX of 1883), section 43—Central Provinces Act of 1898, sections 45 clause (3), 47—Occupancy holding, transfer of part of.

When statutory rights and liabilities have been created and jurisdiction has been conferred upon a special Court for the investigation of matters, which may possibly be in controversy, such jurisdiction is exclusive and cannot concurrently be exercised by the ordinary Court.

When a transfer of occupancy holding was effected without the consent of the landlord at a time when the rent law in force was Act IX of 1883, as amended by Act XVII of 1889, the Civil Courts have jurisdiction to entertain a suit for ejectment. But it is otherwise after the passing of the Central Provinces Tenancy Act of 1898.

The change made in the law in this respect in 1898 is not of procedure only; it affects substantive rights.

Section 43 of the Tenancy Act of 1883 refers to transfers of entire holdings and not of a portion only. So long as the original tenancy subsists, the landlord has no right to re-enter and oust the persons, who are in the land by license from the tenant. **Icharam Singh v. Nilmony Bahida** ... 499

———, local, consent cannot confer, may be raised in appeal—Code of Civil Procedure (Act XIV of 1882), Secs. 16 A, 17, 57.—Procedure, when Court's jurisdiction is doubtful—Plaint, return of, when proper.

If a Court of appeal decides that the original Court had no jurisdiction to entertain the suit, the right course to adopt is to return the plaint for presentation to the proper Court.

Consent of parties cannot confer jurisdiction upon a Court, where it has not inherent jurisdiction over the subject matter of the litigation, and the judgment of a Court which lacks this essential jurisdiction, is totally void and this would not be cured by waiver or acquiescence.

Where, however, the defect is not apparent on the face of the proceedings, where specially the question of jurisdiction depends upon a fact, the existence of which is alleged by one of the parties in the Court of first instance and not controverted by the other, it is not obligatory upon a superior Court to enter into the question, specially where, in order to adjudicate upon the question satisfactorily, a further investigation of the facts would be essential.

If the want of jurisdiction appeared on the face of the pleadings or the admission of the parties or upon the evidence, the question could not only be raised in appeal for the first time, but it would be the duty of the Court to entertain it.

When an objection as to jurisdiction is taken for the first time before the appellate Court, and it becomes at least one upon which there is a reasonable ground for uncertainty, the Court should proceed under subsection 2 of section 16 A of the Civil Procedure Code and refuse to allow the objection to be taken at the appellate stage. **Abdulullah Sarkar v. Asraf Ali Mandal** ... 152

——— Removal of nuisance—Magistrate, power of, to go into question of Civil right, See Criminal Procedure Code, Sec. 133 ... 188

Khas possession, suit for, by landlord against right and the purchase—

Permissive possession of homestead land, See Occupancy holding ... 303

Land Acquisition Act—Fishery right—Land—What is to be acquired—Reference, bad—Court, duty of.

Fishery rights are not land within the meaning of the Land Acquisition Act.

Land Acquisition Act,—(Contd.)

What is to be acquired in every case under the Act is the aggregate of rights in the land, and not merely some subsidiary right as fishery right.

It is the duty of the Civil Court to set aside proceedings of, and a reference by, the Collector, which are bad, being contrary to the provisions of the Act.

Raja Shyam Chandra Mardraj Harichandan Raj Narain Das v.

The Secretary of State for India in Council ... 445

Landlord—Mortgagee of a non-transferable holding auction-purchaser, a trespasser—Suit for ejectment—Non-occupancy tenant not a necessary party, *See Abandonment* ... 72

—, re-entry, when can be effected, *See Jurisdiction*, when exclusive 499

—, re-entry by—Effect of not following the procedure laid down in Sec. 87 of the Bengal Tenancy Act, *See Abandonment* ... 72

—, Trespasser—Suit for ejectment—Tenant not in occupation not a necessary party, *See Abandonment* ... 72

—, *who is—Assignee of land as well as arrears of rent.*

The person to whom the land, the rent for which is claimed, as also the arrears of rent are transferred is an assignee of the whole interest of the landlord and is a 'landlord' within the Bengal Tenancy Act. **Sashi**

Kumar Mirbahar v Sita Nath Banerji ... 425

— **and tenant**—Co-sharer landlord—Suit for entire rent—Co-sharers made defendants—Maintainability of suit.

A co-sharer landlord is entitled to maintain a suit for the entire rent, if his co-sharers are on their refusal to join as plaintiffs, made defendants in the suit. **Sashi Kumar Mirbahar v. Sita Nath Banerji ... 425**

—, denial of relation and setting up third party as landlord in a previous rent suit by some of the landlords, *See Ejectment*, suit for ... 483

—, denial of relation—Waiver—Plea of dispossession by third person, if renunciation of relation—Section 111 of Transfer of Property Act—*Onus.*

Where, after the denial of his title by the tenant, the landlord received rent, he can not rely upon the denial as a ground of forfeiture.

It is not a renunciation of his character as lessee under the lease when sticking to his character as lessee he said that inasmuch as he could not get possession of some land within the lease in respect of which he set up the right of a third person and as he could get no satisfaction from his lessor, he had to make the best terms he could with the third person in order to prevent him from turning him out of the land.

Where after the execution of the *hebanama*, the basis of the plaintiffs' title, the grantors of the *hebanama* executed leases in favor of the defendants, the fact that the defendants paid rent to the plaintiffs does not make the plaintiffs the defendants' lessors.

It is upon the plaintiffs to make out that the lessee has renounced his character as such by setting up a title in third person or by claiming title in himself.

Seemle.—Section 111 of the Transfer of Property Act deals with the whole lease of the immovable property comprised therein and not with a part or moiety of it. The section has no application where there is no renunciation by one of the two lessees.

Quære.—Whether or not the institution of the suit itself to evict the

Landlord and tenant,—(Contd.)

tenant is an act by the lessor showing his intention to determine the lease or whether there must be act done by him showing such intention prior to the institution of the suit. **Farman Bibi v. Tasha Haddal Hossein** 648

————— Evidence—Proprietary right, *See* Decree against landlord ... 384

————— Non-transferable holding—Tenant remaining in occupation as vendee's under-raiyat—Refusal to pay rent—Assertion of right to transfer, *See* Bengal Tenancy Act, Sec. 87 ... 78

————— *Non-realization of rent, effect of.*

When the relation of landlord and tenant exists between two persons in respect of any property, the mere non-payment of rent, though for many years, is not sufficient to show that the relationship of landlord and tenant has ceased. **Rameshar Koer alias Dulpin Saheba v. Gobardhan Lal** ... 202

Landlord parting with his interest after the accrual of rent, if has a first charge—Decree, character of—Putni Regulation (VIII of 1819), Sec. 13, cl. (4)—Durputnidar's lien, if superior to landlord's charge—Bengal Tenancy Act (VIII of 1885), Sec. 165.

There is nothing in the law which disentitles a landlord to a first charge, because after the accrual of the rents he sued for, he parted with his interest in the zemindari.

The character of the decree a suitor obtains depends on the nature of the claim, and of his right to the relief sought for and is not altered by any change in his position which may have taken place subsequent to the accrual of his right to sue.

A *durputnidar* in possession of *putni* under section 13 cl. (4) of the Putni Regulation has only a lien, not a first charge, on the *putni*.

A landlord, who, though after the accrual of the rent sued for, parted with his interest in the zemindari, has a priority over a person having a lien under section 13, cl. (4) of the Putni Regulation and can under section 165 of the Bengal Tenancy Act sell it free of all encumbrances. **Maharaj Bahadur Singh v. A. H. Forbes** ... 652

Land Registration Act—Action of revenue authorities under it—Competency of Civil Court to direct such action.

Where the suit was really to obtain an order from a Civil Court which would bring about a reconsideration of the order passed by the revenue authorities under the Land Registration Act (VII of 1876, B. C.) in regard to the registration of the name of the plaintiff, as co-trustee, with that of another, the High Court dismissed the suit, holding that Civil Court was not competent to direct the action of the revenue authorities under that Act :

Held, that the view taken by the High Court as to the scope of the suit and its non-maintainability, was well founded. **Chhatrapat Singh Dugar v. Maharaj Bahadur Singh** ... 395

Lessee, holding over after expiry of lease—No arrangement—Limitation Act Sch. II Art. 139—Adverse possession—Time when begins to run, See Lessor and lessee ... 615

Lessor and lessee—Adverse possession—Non-payment of rent, if creates adverse possession—Lessee holding over—Limitation Act (XV of 1877), Sch. II, Art. 130.

Where a lessee enters into possession under a lease, he cannot acquire any title by adverse possession against his lessor pending the term of the lease unless he distinctly

Lessor and lessee,—(Contd.)

asserts such a title to his knowledge and gives him notice that he asserted such a title.

A failure to pay rent to the lessor during the period of the lease does not alone operate to create in favour of the lessee a title by adverse possession.

If a lessee holds over after the expiry of the lease and if no subsequent arrangement is arrived at between him and his lessor by which a new tenancy is created, time begins to run under article 139, Sch. II of the Limitation Act, against the lessor from the date of the expiry of the lease. **Madan**

Mohan Gossain v. Kumar Rameswar Malia ...

615

Grantor of *hebanama* executing lease—Lessee paying rent to grantee of *hebanama*, if creates the relation of landlord and tenant,

See Landlord and tenant, denial of relation ... 648

Letters Patent, 1865, cl. 12—Registrar, power of, to grant leave—Objection

—Waiver, *See* High Court, Letters Patent, cl. 12 ... 441

Liability—Witness—Mortgage-bond—Son of the mortgagor, *See* Signature 195

License, sale without—Contravention of condition of license—Master and

servant, *See* Bengal Excise Act, Secs. 53, 59, 61 ... 377

Lien, creation of, under Sec. 13 cl. (4) of Putni Regulation condition necessary—Statutory lien, *See* Putni Regulation Sec. 13 cl. (4) ... 604

—, suit to declare, created by Sec. 13 cl. (4) of Putni Regulation, if necessary—Plea set up as a reply to a claim for rent, *See* Putni Regulation, Sec. 13 cl. (4) ... 604

—, of under-tenure-holder, when extinguished—Steps, if necessary, for declaration, *See* Putni Regulation, Sec. 13 cl. (4) ... 604

Limitation imposed by will, effect of—Hindu widow—Life interest

—Absolute gift—Power of alienation by gift or sale—Gift over, *See* Will, construction of ... 540

—, no admission, raised in appeal—Bengal Tenancy Act, Sec. 184—Sub-sec. 1

—Admission of law—Admitted facts of the case.

The question of limitation, raised in the written statement but abandoned in the Court of first instance, is a clear question of law, and it could be raised in the Court appeal.

Under section 184, sub-section (1) of the Bengal Tenancy Act, it is obligatory upon the Court to dismiss the suit on the ground of limitation, although limitation has not been pleaded.

Refusal by a counsel or pleader to urge a question of law is a mere admission of law which is not binding upon the party, and the party may raise the question in appeal although not raised in the lower Court, specially where the question of limitation obviously arises upon the admitted facts of the case. **Abdulullah Sarkar v. Asraf Ali Mandal** 152

— Mortgage, suit to enforce—Liability of members, personal or otherwise, *See* Hindu Law—Mitakshara ... 195

—, power of Magistrate to go into question of—Jurisdiction, *See*

Criminal Procedure Code, Sec. 133 ... 188

— Possession, suit for—Mortgagee-purchaser—Formal possession—Period from which limitation runs—Third person in actual possession—Ouster.

In execution of a mortgage decree the mortgagees purchased the property under mortgage on the 7th October 1888 and took formal possession of it on the 17th February 1890

Limitation,—(Contd.)

The plaintiff who bought the property from the auction-purchaser brought a suit for possession on the 20th December 1901 against the mortgagor and his vendees, who were not parties to the mortgage suit.

Held, that the suit was barred by limitation as the cause of action accrued when the mortgage security ceased on the 7th October 1888.

In the case of a third person who had already purchased the property and obtained actual possession, delivery of possession as against the judgment-debtor alone, cannot amount to an ouster of the person in possession.

Ramjan Mahomed v. Chunder Mohan Aditya ...	640
——— Rent suits—Fuslee year—Rent due on the last day of Bhadra, See Bengal Tenancy Act, Sch. III art. 2 (b) ...	106
———, when begins to run—Decree modifying original decree on appeal—Civil Procedure Code, Sec. 230, See Execution of decree	305
——— Act, Secs. 7, 8—Minority of one of several decree-holders—Extension of time.	
Where one of several decree-holders is a minor, he can get an extension of time after the cessation of his disability and he may apply for execu- tion of the whole decree. Sheikh Jamir v. Srimati Lal Bibi ...	308
———, Sch. II arts. 89, 116, 132—Principal and agent—Contract of service in writing and registered, See Accounts, suit for ...	279
———, Sch. II arts. 91, 144—Suit by real owner against benamidar—Unnecessary to set aside, See Benami conveyance ...	528
———, Sch. II arts. 138, 142—Chota Nagpore Landlord and Tenant Procedure Act, Sec. 37—Deinal of tenant's title by landlord, See Suit to recover tenure ...	560
———, Sch. II art. 139—Lessee holding over after expiry of lease—No arrangement—Adverse possession—Time when begins to run, See Lessor and lessee ...	615
———, Sec. 14—Exclusion of time—Non-mention of claim to extension in the plaint, not fatal, See Suit to recover tenure ...	560
———, section 14—Period during which right to sue is suspended, whether allowable.	

An issue was raised between co-defendants in a suit. One of them got judgment in his favour, which however was reversed on appeal. Then the unsuccessful respondent filed a suit against the successful appellant:

Held, that the plaintiff is entitled to deduct the period during which there was a judgment of the lower Court in his favour.

Courts of justice ought to relieve parties against that injustice occasioned by its own acts or omissions at the instance of the party, against whom the relief is sought. Lakhan Chandra Sen v. Madhu Sudan Sen ...	59
———, Sec. 22—Addition of parties after limitation—Rent due to members of joint Hindu family—Suit by some of the co- owners, maintainability of—Claim joint and indivisible, See Joint Hindu family ...	251

Limited interest—Adverse possession.

The possession of a limited interest in immovable property may be just as much adverse for the purpose of passing a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property: but such adverse possession

Limited interest,—(Contd.)

of a limited interest though a good plea to a suit for ejectment, is good only to the extent of that interest; the nature and effect of possession must depend upon the nature and extent of the rights asserted by the overt conduct or express declaration of the person relying on it, there can be no acquisition by adverse possession of an absolute title, when nothing but a limited interest has been asserted. **Icharam Singh v. Nilmony Bahida**

499

Lispendens, doctrine of, when applies, *See* Mortgagee-purchaser, rights of ...

———— Mortgage suit—Decree nisi—Decree for sale, *See* Mortgagee-purchaser, rights of 1

———— Purchaser of share of an estate under Sec. 13 of Act XI of 1859 when affected, *See* Mortgagee-purchaser, rights of 1

Local Government—Criminal Procedure Code, Sec. 196—Authority who is to sign, *See* Indian Penal Code, Sec. 124A 49

Magistrate, transfer of—Transfer of case—Trial *de novo*, *See* Criminal Procedure Code, Secs. 350, 528 488

Mahomedan Law—Validity of gift—*Murz-ul-mout*—Right test to be applied.

Where the question was whether a certain deed of gift made by a deceased Mahomedan donor in favour of his son was invalid by reason of the Mahomedan Law of *murz-ul-mout* relating to gifts made in death-illness, and the Courts in India concurred in finding in favour of the donee and applied the test which was treated as decisive on this point, "was the deed of gift executed by the donee under apprehension of death," their Lordships held that the test, which appeared to be the right question, was essentially one of fact, and upheld the concurrent findings of the lower Courts in favour of the donee. **Fatima Bibi v. Sheikh Ahmed Buksh** 122

Maintenance deed, construction of, *See* Deed, construction of 291

———— grant—Life grant—Presumption, rebuttable, *See* Sanad, construction of 202

———— cost—Mortgage deed, construction of, *See* Redemption 215

Makarari, grant of, *See* Sanad, construction of 202

"**Malik**" effect of the word—Testamentary gift of immovable property to a Hindu widow—Interpretation in such a case, principle of, *See* Hindu Law 131

Marriage—Presumption of its existence arising from co-habitation with habit and repute—Conditions precedent to its application.

Before applying the general presumption of marriage arising from co-habitation with habit and repute, it is necessary to make sure that there are the conditions necessary for its existence, *viz.*, first, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise, and second, the habit and repute, which alone is effective, is habit and repute of that particular status, which in the country, in question, is lawful marriage. **Ma Wun Di v. Ma Kin** 112

Marshalling—Contribution—Mortgagor and mortgagee, *See* Transfer of Property Act, Sec. 82 274

Master and Servant—Ganja being in possession of—Sale without license—Contravention of condition of license, *See* Bengal Exise Act, Secs. 53, 59, 61 377

Matter directly and substantially in issue—Declaration that the appraisal made by the Collector under Sec. 69 of the Bengal Tenancy Act was invalid—Trial of issue in subsequent suit whether the rent of the holding is payable entirely in cash or partly in cash and partly in kind, if barred, *See* Civil Procedure Code, Sec. 18 251

Mourasidar—*Dur-mourasi*—*Dur-mourasidar mokarari*, what it connotes—*Right of enhancement*—*Contract of tenancy*.

The word *mourasidar* does not convey the idea of a right to fixity of rent; *durmaurasi mokarari* implies fixity of rent.

The right of enhancement is not an incident of every contract of tenancy. **Satis Chunder Chattopadhyaya v. Rai Jatindra Nath Chowdhury** 284

Media concludendi, possibility of, being the same in other actions, gives the Court no power to pronounce upon them—*Suit for possession*—

Failure of cause of action, *See* Practice 41

Mesne profits, application to determine—*Dismissal for default*—*Fresh application*—*Limitation*—*Striking off and dismissal of, application, difference between*—*Decree, execution of, application for*.

Applications to determine mesne profits are treated as applications for execution of the decree and the striking off of such cases does not finally decide them or prevent the decree-holder from making a further application for the determination of mesne profits.

There is no substantial distinction between an order striking off an application and one dismissing it for default. **Upendra Chandra Singh v. Sakhi Chand** 301

————— *Assessment, principle of*—*Jote and Khamar lands*—*Decree-holder not a cultivator*—*Deductions to be made in case of khamar lands*—*Interest, rate of*—*Civil Procedure Code (Act XIV of 1882), Sec. 211*.

In the assessment of mesne profits, two different principles are adopted, one applicable to the case of the rent-paying lands or *jote* lands, and the other applicable of the *khamar* lands.

The decree-holder, though not himself a cultivator is to be regarded as the potential, and therefore the actual cultivator of the specific plots which were cultivated by the judgment-debtors from whom he succeeded in obtaining possession. The occupation of *khamar* lands in the direct cultivation of the *maliks* very nearly approximates to the occupation of *raiya* lands held by ordinary cultivators.

The deduction to be made from the value of the produce of the *khamar* lands on account of the risk and supervision of the cultivation carried on by persons in the position of the decree-holder in addition to the ordinary costs of cultivation, may be calculated at half the usual rate on account of collection charges allowed in the case of rent-paying or *jote* lands. Five per cent. on the value of the actual produce of the *khamar* lands is a sufficient allowance to meet the costs of supervision and any other incidental charges.

A claim for mesne profits includes interest on such mesne profits. Interest as forming a part of the mesne profits or damages cannot be allowed for any period subsequent to that limited by section 211 of the Civil Procedure Code, and in the exercise of a proper discretion, the higher rate of 12 per cent. should continue till the obtaining of possession by the decree-holder.

Mesne profits,—(Contd.)and thereafter at the usual Court rate. **Ijjatulla Bhuyan v. Chandra**

Mohan Banerjee	197
Debutter property, liability of, <i>See</i> Shebait, decree against ...	514
<i>decree for—Satisfaction—Apportionment—Contribution.</i>	

When a decree for mesne profits was satisfied by some out of the entire body of persons liable thereunder by payments made from time to time, and a question arose as to the principle which would regulate contribution amongst the parties themselves :

Held, that the correct principle was to allow interest on the sums paid from the date of payment, and then to apportion rateably the whole sum crediting interest on each amount paid in favour of the party on whose behalf it was paid, from the date of payment until the final satisfaction of the decree for mesne profits.

Judgment of the Judicial Committee in **Jotindra Mohan Lahiri v. Guru Prosonno Lahiri** explained. **Guru Prasanna Lahiri v. Jotindra**

Mohun Lahiri	454
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Minor—Account—Principal and agent—Advances made by agent—Benefit of minor—Application of advances, <i>See</i> Equity	87
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Misdescription of articles on which the prosecution is based—Presumption—Evidence Act, Sec. 114 of the—Criminal Procedure Code. Sec. 537, <i>See</i> Indian Penal Code, Sec. 124A	49
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Misdirection—Sessions trial—Charge to Jury—Statements of witnesses—Criminal Procedure Code (Act V of 1898), Sec. 164—Propriety—Judge's opinion on evidence.	
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In a trial by jury, the Judge ought to tell the jury that the evidence of witnesses taken under section 164 of the Criminal Procedure Code must be accepted with a great deal of caution. He ought to point out that it is not always proper for the police officer to get such statements recorded for the purpose of pinning the witnesses down to some statement, specially at a time when they are not entirely free from police influence.

It is misdirection for the Judge to say that he sees no reasons to disbelieve a particular witness. He ought to leave the question of believing or disbelieving to the jury.

In placing a suggestion made by the Crown prosecutor without any evidence to support it, before the jury, the Judge ought to point out that there is no evidence to support the suggestion. Kali Singh v. King Emperor ...	246
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Misjoinder—Refusing to take oath and answer questions—Charges under Secs. 178, 179, Indian Penal Code—Criminal Procedure Code, Secs. 234, 537, <i>See</i> Criminal Procedure Code, Secs. 234, 235, 480, 482, 537 ...	63
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Mortgage judgment on—Debt when extinguishes.

The mere fact that a judgment has been obtained on a mortgage does not extinguish the debt, and the mortgage continues as a lien till it is satisfied or the judgment is barred by the Statute of Limitations. **Bhawani**

Koer v. Mathura Prasad	1
<i>of non-existent property—Executory agreement.</i>	

A mortgage of non-existent property, though inoperative as a conveyance, is operative as an executory agreement, which attaches to the property, the moment it is acquired and in equity transfers the beneficial interest to the mortgagee without any new act done by the mortgagor to confirm the mortgage. **Khobhari Singh v. Ram Prasad Roy**

Mortgage , if and when kept alive—Intention, <i>See</i> Mortgagee-purchaser, right of	1
— of non-transferable holding, effect of—Landlord—Mortgage, <i>See</i> Abandonment	72
— Necessary formalities wanting—Mortgage not converted into charge, <i>See</i> Transfer of Property Act, Secs. 58, 59, 100	402
—, suit to enforce—Joint Hindu family—Liability of members, personal or otherwise—Limitation, <i>See</i> Hindu Law—Mitakshara ...	195
Mortgagee of non-transferable holding auction-purchaser—Landlord, <i>See</i> Abandonment	72
— auction-purchaser in suit against judgment-debtor only—Vendees of judgment-debtor who were not parties to suit in actual possession—Delivery of possession against judgment-debtor only—Period from which limitation runs, <i>See</i> Limitation	640
— of a share of co-percener when joint—Mortgagor's right after partition—Purchaser of co-percener's share in execution of money decree in partition suit, with knowledge of mortgage, if bound, <i>See</i> Joint Hindu family	644
—, right of, co-percener's share, when joint, after partition—Purchaser of co-percener's share in execution of money decree in partition suit, with knowledge of mortgage, if bound, <i>See</i> Joint Hindu family	644
Mortgage decree —Decree directing sale of <i>niz jote</i> lands—Execution, <i>See</i> Execution of mortgage decree	101
— Execution—Power of executing Court—Transfer of Property Act (IV of 1882), Sec. 89—Adjustment—Enquiry into—Civil Procedure Code (Act XIV of 1882), Secs. 244, 258.	
The powers of the Court which is called upon to execute a mortgage decree are not confined within the four corners of the rules framed under section 104 of the Transfer of Property Act.	
If an adjustment is pleaded, it raises a question relating to the execution or satisfaction, partial or otherwise, of the decree and the Court must enquire and determine how much is due and realisable under the decree at the time execution is sought.	
The mortgagor may redeem at any time after the passing of the decree under section 89 of the Act before the actual sale and the Court has jurisdiction to investigate whether the decree has or has not been adjusted wholly or in part.	
<i>Quære</i> : Whether section 258 of the Civil Procedure Code being not mentioned in the Rules framed by the High Court, applies to proceedings in execution of a mortgage decree. Harish Chandra Mandal v. Jagabandhu Dutt	
Mortgage deed , construction of—Compound interest—Maintenance cost—Enhanced Government Revenue—Arrears of rent—Rent, statute-barred or otherwise—Previous suit for possession—Account filed therein—Estoppel—Recovery of costs thereof, <i>See</i> Redemption	215
Mortgage lien —When kept alive in equity—Fraud—Wrong, <i>See</i> Mortgagee-purchaser, rights of	1

Mortgagee purchaser, rights of, to fall back upon mortgage—Mortgage, if and when kept alive—Equity—Lis pendens, doctrine of, when applies—A purchaser of a share of an estate under sec. 13 of Act XI of 1859 when affected by lis pendens.

Although a security is extinguished upon the actual sale of the mortgaged properties and distribution of the proceeds, yet, a mortgagee, who has purchased at a sale in execution of a decree upon his mortgage, is entitled to rely upon his mortgage as a shield against a subsequent encumbrancer.

The question whether a mortgage which has been satisfied is to be construed as extinguished or kept alive for the benefit of the person who makes the payment, is simply a question of intention to be determined with reference to the surrounding circumstances as they exist at the time when the mortgage is discharged. Although ordinarily, when the interests of the mortgagor and the mortgagee are united in the same person, it is not necessary for him to keep them distinct, equity will keep them distinct, when from the intention of the party, either express, or implied, it is for his benefit that they should be so kept; it depends upon the intention, actual or presumed, of the person in whom the interests are united, and this person will be presumed to intend that which is most to his advantage.

Where the mortgagee institutes an action to enforce his security, proceeds to judgment, sells the premises, and purchases them himself, it does not necessarily follow that he intends that his title under the mortgage should merge in the equity of redemption.

A mortgage, however, will not be kept alive in aid of a fraud or wrong; a mortgage substantially satisfied may be kept alive in equity only when this is requisite to the advancement of justice, and this will never be allowed when the result will be, from the forms of law, to aid in perpetrating a fraud or an injury.

A purchaser of a share of an estate under section 13 of Act XI of 1859 may be affected by the doctrine of *lis pendens*, if he makes his purchase during the pendency of a litigation to enforce a mortgage upon that property.

In the case of a mortgage suit, the *lis pendens* continues after the decree nisi, and the doctrine of *lis pendens* is applicable to proceedings to realise the mortgage after the decree for sale.

But where, as in the present case, the purchase at the revenue sale was effected sometime after the mortgage sale had been confirmed, there was no *lis pendens* on the mortgage pending at the date of the revenue sale.

Bhawani Koer v. Mathura Prasad ... 1

Mortgagor and mortgagee, interests of, united in the same person—
Intention—Equity—Mortgage lien kept alive, *See* Mortgagee-purchaser,
rights of ... 1

"Movable property" if includes money—Limitation Act, Sch. II art.
89, *See* Account, suit for ... 279

Murz-ul-munt—Validity of gift— Right test to be applied, *See* Mahomedan Law ... 122

Native State—East India Company—Cantonment Land—Rights of alienation and management and control of the same in the absence of any treaty.

The Brigadier of the Hyderabad Subsidiary force has no title to any portion of the territory of the Nizam and has no authority to make any alienation thereof in perpetuity. It is the State alone which can make a valid

Native State,—(Contd.)

grant of the land and the Cantonment Authorities have power to regulate the use thereof only in so far as it may affect the convenient occupation of the Cantonment. <i>Pestonji Jivanji v. Edulji Chinoy</i> ...	401
Nij-jote lands , decree directing sale—Mortgagor—Judgment-debtor, if competent to raise the question of saleability in execution, <i>See</i> Execution of mortgage decree ...	101
Non-transferability —Tenant-at-will—Agricultural holding, <i>See</i> Ejectment, suit for ...	107
Notice , <i>See</i> Evidence Act, Secs. 13, 65, 66 (2) ...	90
——, proof of service of—Incumbrance— <i>Oaus</i> , <i>See</i> Bengal Tenancy Act, Sec. 167 ...	262
——, if necessary—Building erected without sanction, <i>See</i> Calcutta Municipal Act, Secs. 372, 383, 449(1) ...	243
——, service of, whether necessary—Bengal Tenancy Act, Sec. 87, Sub-Sec. 2—Re-entry, <i>See</i> Abandonment ...	72
——, service of, by post—Presumption, <i>See</i> Bengal Tenancy Act, Sch. III Art. 2 (a) ...	251
—— to quit—Receipt—Ignorance, <i>See</i> Recognition ...	90
—— to quit addressed to tenant as trespasser, if legal, <i>See</i> Ejectment, suit for ...	107
—— to quit, if necessary—Tenancy of homestead land created before Transfer of Property Act—Implied Surrender, <i>See</i> Ejectment, suit for ...	309
——, validity of—Purchaser, how to prove—Incumbrance, <i>See</i> Bengal Tenancy Act, Sec. 167 ...	262
Nuisance , removal of—Conditional order—Claim of right to land— <i>Bona fides</i> of the claim, finding of—Limitation of claim—Magistrate, power of, to go into question of Civil right—Jurisdiction, <i>See</i> Criminal Procedure Code, Sec. 133 ...	188
Oath , refusal to take—Refusing to answer questions—Charges under Secs. 178, 179, Indian Penal Code—Misjoinder—Criminal Procedure Code, Secs. 234, 537, <i>See</i> Criminal Procedure Code, Secs. 234, 235, 480 482, 537 ...	63
Occupancy holding , purchaser of a portion of, right of, to make deposit—Deposit to set aside sale—Sale of holding for the own arrears—Transferability of the holding, <i>See</i> Civil Procedure Code, Secs. 310A, 244 ...	282
——, non-transferable, transfer of—Abandonment— <i>Permissive possession of homestead land—Khas possession, suit for.</i>	
An occupancy raiyat sold his holding, which was not transferable by custom, and gave up possession to the purchaser of all the culturable lands of the holding and remained in possession of the homestead land only by permission of the purchaser :	
<i>Held</i> , that was sufficient to indicate that the raiyat had abandoned his holding and he was liable to the consequences of such abandonment. The landlord is entitled to recover khas possession against the raiyat and the purchaser. <i>Sailabala Debi v. Sriram Bhattacharya</i> ...	
——, transfer of part of—Central Provinces Rent Law, Sec. 43—	303
Ejectment, suit for, <i>See</i> Jurisdiction, when exclusive ...	499
Occupancy right accrues in what land—Tenure-holder holding some land as a raiyat—Suit for ejectment, <i>See</i> Bengal Tenancy Act, Sec. 21 ...	475

Offence , material ingredient of, not stated—Misdirection, <i>See</i> Charge to Jury	599
Onus of proof —Salesability or otherwise of nij-jote lands—Decree directing sale of nij-jote lands, <i>See</i> Execution of mortgage decree	101
— Possession, suit for—Plaintiff to prove what, <i>See</i> Ejectment, suit for	414
— Tenure-holder—Purchaser of non-permanent tenure, <i>See</i> Ejectment	553
— Purchaser—Service of notice, <i>See</i> Bengal Tenancy Act, Sec. 167	262
— <i>Prima facie</i> case—Weakness of adversary's case.	
The party on whom the onus of proof lies must in order to succeed establish at least a <i>prima facie</i> case. He cannot on failure to do so take advantage of the weakness of his adversary's case. Rajani Kumar Das v. Gour Kishore Saha	
— Rent, deposit of—Bengal Tenancy Act, Sec. 61, Sub-sec. (2), <i>See</i> Bengal Tenancy Act, Sch. III Art. 2(a)	583
— Order-sheet, entries in, evidential value of—Notice, proper service of, <i>See</i> Bengal Tenancy Act, Sec. 167	251
—, <i>ex parte</i> , entry in—Evidence against landlord, if—Bengal Tenancy Act, Sec. 61, <i>See</i> Bengal Tenancy Act, Sch. III art. 2(a)	262
Ouster —Delivery of possession against judgment-debtor only—Third person in actual possession—Period from which limitation runs, <i>See</i> Limitation	251
Owner , right of, to recover possession of property—Colourable conveyance in fraud of creditor—Fraud absolutely defeated—Suit by real owner against benamidar, <i>See</i> Benami conveyance	640
Parties , necessary—Party, death of—Substitution of heirs, not made in time—Abatement of suit, <i>See</i> Partnership	528
Partition , decree for—Decree for possession—Partition Act, Sec. 4, <i>See</i> Civil Procedure Code, Sec. 331	203
—, suit for—Party—Co-putnidar and not darputnidar necessary party.	98

A person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition, as against persons who hold interests of a superior grade.

In a suit for partition by *putnidars* against *darputnidars* under his *co-putnidars*, the *co-putnidars* must be made parties; but a *darputnidar* is not a necessary party in a suit for partition, if his *putnidar* is made a party, and if such a *putnidar* does not wish to avoid the responsibility which attaches to a party in a partition suit, that is, to see that the partition is carried out in a fair and equitable manner. **Upendra Chandra Singha Roy v. Mahomed Faiz Chowdhry**

Partition Act , section 4—Decree for partition—Member of joint family, when can buy, <i>See</i> Civil Procedure Code, Sec. 331	449
	98

Partnership, suit for dissolution of—Necessary parties—Party, death of—Substitution of heirs, not made in time—Abatement of suit.

A suit for dissolution and winding-up of a partnership involves the determination of the plaintiff's share and the taking of accounts, and the plaintiff's share could not

Partnership,—(Contd.)

be determined definitely without making all the parties interested in the partnership, parties to the suit, and the accounts could not be properly taken in the absence of any of them.

If on the death of one of the defendants, his heirs are not made parties to the suit by substitution in time, the whole suit is to be dismissed, even where no relief against the deceased defendant or his heirs was asked for specifically. **Srinath Pal v. Hari Charan Pal** 266

Party—Co-putnidar and not darputnidar not necessary party, *See* Partition, suit for 449

——— Suit for ejectment by landlord against mortgagee-auction-purchaser—Non-transferable holding—Non-occupying tenant, *See* Abandonment 72

Pauper, suit by, *See* Security for costs 312

Permissive possession of homestead land—Khas possession, suit for, *See* Occupancy holding 308

Plaint, non-mention of exclusion of time, not fatal, *See* Suit to recover tenure 560

———, return of, when proper—Original Court had no jurisdiction, decision by the appellate Court, *See* Jurisdiction 152

———, stamp on—Suit for declaration, *See* Civil Procedure Code, Sec. 263 36

Pleader not empowered by Vakalatnama, brief transferred to—Adjournment—Hearing ex parte—Proper discretion, *See* Rent Recovery Act, appeals under 426

———, refusal by, to urge question of law—Admission of law—Parties, effect on—Admitted facts of the case, *See* Limitation 152

Point not taken in lower Courts—Privy Council, *See* Practice 215

——— raised for the first time—Privy Council, *See* Practice 112

Political Agent, warrant issued by—Jurisdiction of Magistrate to release arrested person on bail; where no endorsement, *See* The Indian Extradition Act, Sec. 8 171

Possession, Constructive, doctrine of

The doctrine of constructive possession applies only in favour of the rightful owner and must not as a rule be extended to a wrong-doer whose possession must be confined to land which he is actually in possession.

The principle upon which the doctrine of constructive possession is based stated. **Mirza Shamsher Bahadur v. Kunj Behari Lall** .. 414

———, evidence of, unsatisfactory—Presumption, *See* Ejectment, suit for 414

——— Presumption, *See* Jungle and hilly lands 414

———, suit for—Failure of cause of action—Proper decree to be made in such a case, *See* Practice 44

———, suit for—Non-transferable raiyati holding—Raiyat under raiyat of vendee, *See* Bengal Tenancy Act, Sec. 87 .. 78

———, suit for—Mortgagee-auction-purchaser—Formal possession—Delivery of possession against judgment-debtor only—Third person in actual possession—Period from which limitation begins to run, *See* Limitation 610

Possession, suit for—Title at the date of suit.

In a suit for recovery of possession the plaintiff can succeed only on the title as it stood on the date of the institution of the suit. **Radhay**

Koer v. Ajodhya Das	262
—, suit for—Zemindar and putnidar—Resumption by Government and subsequent settlement with zemindar—Frame of suit, <i>See</i> Chaunkidari chakran land	439
—, sufficiency and effectiveness of, <i>See</i> Jungle and hilly lands	414
—, temporary, of gun without license, if possession, <i>See</i> Indian Arms Act, Sec. 19 (f)	242
'Possessor of properties,' meaning of—Hindu widow—Life-interest—Absolute gift—Powers of alienation by gift or sale—Gift over—Limitation imposed by will, effect of, <i>See</i> Will, construction of ...	540
Post. service by—Presumption—Letter properly addressed, See Bengal Tenancy Act, Sch. III Art. 2 (a)	251
Power of attorney—Attorney creating charge on immovable property, See Registration Act, Secs. 17, 21, 49	149
Practice—Point not submitted to either Court in India, raised before the Privy Council.	

Their Lordships of the Judicial Committee were unable to entertain a point urged by the appellants having the same been submitted in the conduct of the case to neither Court below. **Ma Wun Di v. Ma Kin** ... 112

— *Point not taken before either of the lower Courts, whether the same was open before their Lordships.*

A point not taken by a party before either of the lower Courts was not open to him at the time of the hearing of the appeal before their Lordships.

Muhammad Naseem v. Mirja Muhammad Abbas Ali Khan and Mirza Muhammad Abbas Ali Khan v. Muhammad Naseem	215
— <i>Suit for possession—Failure of cause of action—Proper decree to be made in such a case—Possibility of media concludendi being the same in other actions gives the Court no power to pronounce upon them.</i>	

Where the plaintiffs claimed to have possession of their mother's property on the ground that she was dead and the Court held that it was not proved that the lady was dead, the inevitable inference would seem to be that the suit should be dismissed. The mere circumstance that some of the *media concludendi* might be the same in other actions does not vest the Court with any right or duty to pronounce upon them in a suit which has gone by the board because of the failure of the ground of action. **Mussummat**

Walihan v. Jogeshwar Narayan	44
—, <i>where concurrent findings of fact are under consideration.</i>	

Whether the question is essentially one of fact and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of first instance, it would probably be enough to prevent their Lordships from interfering, if it should appear that there was evidence such as might justify either view, without any clear preponderance of probability. **Fatima Bibi v. Sheikh Ahmed**

Buksh	122
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Pre-emption, when should the necessary claims be made, effect of unreasonable and unnecessary delay—*Mahomedan Law*—Delay, a question of fact—Action to enforce a right of pre-emption—Mortgage—Redemption of the same by the purchaser from the plaintiffs as mortgagees—Effect of such redemption on the plaintiffs' right to pre-empt.

The right of pre-emption must be exercised, and the claims necessary to give effect to it must be made, with the utmost promptitude, and any unreasonable and unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case.

Magni Ram and Jowhuri Lal, the plaintiffs, were owners in equal shares of 12 annas of certain properties comprised in a certain *taluka*. The remaining four annas belonged to the defendant Anupbati, who sold those four annas to the defendant Nirbhoy. Magni and Jowhuri brought suits and claimed the right of pre-emption, against that sale. The two plaintiffs had obtained a transfer of a *zurpeshgi* mortgage, binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the mortgage money in Court, in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; and after some hesitation the two plaintiffs took out that money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption. Their Lordships could not agree with that contention and:

Held, that until a decree for pre-emption was made, Nirbhoy owned the land as purchaser, and had a right to redeem; and that the taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than that, and was quite consistent with the claim to pre-empt.

Baijnath Goenka v. Ramdhary Chowdhury and Deo

Nandan Pershad v. Ramdhary Chowdhury ... 318

Presidency Magistrate, power to try case of disobedience of his own order—*Indian Penal Code*, Sec. 188, *See* *Criminal Procedure Code*, Sec. 487 ... 70

Presumption Batta, *See* Abwab ... 251

————— Maintenance grant—Life grant, *See* Sanad, construction of ... 202

————— Misdescription of articles on which the prosecution is based—*Evidence Act*, Sec. 114 of the—*Criminal Procedure Code*, Sec. 537, *See* *Indian Penal Code*, Sec. 124 A ... 49

—————, of existence of marriage arising from co-habitation with habit and repute—Condition precedent to its application, *See* Marriage ... 112

—————, how weakened, *See* *Evidence Act*, Sec. 90 ... 615

————— Possession, *See* Jungle and hilly lands ... 414

—————, evidence of, unsatisfactory, *See* Ejectment, suit for ... 414

————— Service by post—Letter properly addressed, *See* Bengal Tenancy Act, Sch. III art. 2 (a) ... 251

Principle and agent—Account—Advances made by agent—Benefit of minor—Application of advances, *See* Equity ... 87

————— Limitation—*Limitation Act*, Sch. II arts. 89, 116, 132—Contract of service in writing and registered, *See* Accounts, suit for ... 279

Printer, liability of—Declaration—*Printing Presses and Newspapers Act*, Sec. 7, *See* *Indian Penal Code*, Sec. 124A ... 49

Printing Presses and Newspapers Act, Sec. 7—Declaration by printer—Liability of printer, See Indian Penal Code, Sec. 124A	...	49
Priority—Durputnidar's lien under section 13 cl. (4) of Putni Regulation, See Landlord parting with his interest	...	652
Private defence, right of—Time to have recourse to the public authorities—Person in possession of property, See Indian Penal Code, Secs. 99, 147	...	359
Privy Council—Point not submitted to either Court in India, See Practice	...	112
Point not taken in lower Courts, See Practice	...	215
Probate and Administration Act, Sec. 41—Application by executor's son—Discretion.		
<p>A testator bequeathed by will, the whole of his property to an idol and appointed his wives and son executrices and executor, who, however did not take out any probate but the son mortgaged the property. After the property was sold in execution of a decree on the mortgage, the testator's grandsons under the guardianship of their mother applied for probate of the will :</p> <p><i>Held</i>, they being not executors were not entitled to probate, and the case was not a fit one for grant of probate under section 41 of the Probate and Administration Act, the mother being a pardanashin lady, the father, the defaulting executor would manage the whole business. Norendra Kumar Pramanick v. Charu Chunder Pramanick</p>		
Proceedings, drawing up, on the same day that offence is committed—Criminal Procedure Code, Secs. 480, 482, See Criminal Procedure Code, Secs. 234, 235, 480, 482, 537	...	63
Procedure when Court's jurisdiction is doubtful—Code of Civil Procedure, Secs. 16A, 17, 57, See Jurisdiction	...	152
Proprietor, meaning of, See Tanki-tenure	...	480
Provincial Small Cause Courts Act, Schedule II, Clause 8—'Judge of the Court of Small Causes, meaning of; if it means and includes Munsiffs and other Judicial officers vested with Small Cause Court powers.		
<p>The expression, "the Judge of the Court of Small Causes" in clause (8) of the Second Schedule of the Provincial Small Cause Courts Act, must be taken to apply either to the Judge of the Court of Small Causes constituted under the Act or of a Court invested with the jurisdiction of a Court of Small Causes.</p> <p>Where, therefore, the Local Government purporting to act under clause (8), Schedule II of the Provincial Small Cause Court Act, by a Notification in the Official Gazette, invested in general terms the Munsiffs of a certain place, with authority to exercise jurisdiction with respect to suits for the recovery of rent of homestead lands up to a certain value, and empowered such Munsiffs to try such suits under the Small Cause Court procedure, such Munsiffs, if invested with the jurisdiction of a Court of Small Causes, are competent to entertain and try such suits as a Court of Small Causes. Akshay Kumar Saha v. Hira Lal Dosadh</p>		
Pulsane mortgagee, sale by, of property not mortgaged, validity of, where to be questioned, See Execution proceedings	...	270
Purchaser at revenue sale—Title when vests and when complete—Sale certificate, evidence of title—Purchaser take what, See Revenue Sale Law, Secs. 37, 54	...	397
of a share of an estate in the Revenue Sale, what taken, See Revenue Sale Law, Secs. 13, 14 53, 54	...	1

Purchaser of a share of an estate does not take subject to any encumbrance created after default, <i>See</i> Revenue Sale Law, Secs. 13, 14, 53, 54	...	1
——— of share of an estate when affected by Lispendens, <i>See</i> Mortgagee-purchaser, rights of	... ..	1
——— at revenue sale takes what, <i>See</i> Revenue Sale Law, Secs. 27, 54	...	387
——— shall not acquire any right which was not passed by the previous order or owners, meaning of—Sec. 54 of the Revenue Sale Law, <i>See</i> Revenue Sale Law, Secs. 13, 14, 53, 54	... ..	1

Putni Regulation , Sec. 13 cl(4)—Darputnidars' lien, if superior to landlord's charge—Bengal Tenancy Act, Secs. 65, 165, <i>See</i> Landlord parting with his interest	... ..	652
———, Sec. 13 clause 4—Under-tenure-holder making deposit—Suit for possession, if necessary—Lien when extinguished—Statutory lien.		

Per Stephen J.—A special suit to declare the lien, created by section 13, clause 4 of the Putni Regulation, terminated by satisfaction of the debt is unnecessary, when the plea of suit is set up as a reply to a claim for rent and the defendant uses it only as a basis for resisting that claim.

The creation of a *gribi* estate is a formal act both according to the language of Regulation VIII of 1819, section 14, and according to universal practice and cannot be inferred from the conduct of the parties.

Per Mookerjee J.—The under-tenure-holder who makes the deposit under section 13 clause 4 of Putni Regulation is entitled to remain in possession only so long as the full amount advanced, with interest, is not realized from the usufruct of the tenure. If, after his debt has been satisfied, he does continue in occupation, he does so at his peril and renders himself liable to account for the profits received in excess. His position is analogous to that of a mortgagee in possession who stays on the premises after his dues have been satisfied.

The lien is extinguished by satisfaction of the debt from the profits of the tenure. No order of the Collector is necessary in this behalf, nor is recourse to a regular suit essential to alter the legal position of the parties. The moment the lien is extinguished the defaulter becomes entitled to recover possession.

Section 13 clause 4 of the Putni Regulation makes it a condition precedent to the creation of the lien that the amount lodged should be advanced from private funds and should be paid by the tenure-holder after he had already paid the whole of the rent due from himself.

The lien in question is a creation of the Statute; and statutory liens cannot be created by consent; the provision of the law must be strictly complied with before reliance can be placed upon the lien.

A mere treatment of the under-tenure-holder by the landlord as a usufructuary encumbrancer is not sufficient to create the statutory lien.

Jakhomull Mehera v. Saroda Prosad Dey ... 604

Putnidar, statement by, if binds transferee

A statement in the plaint, unchallenged and made by the <i>putnidar</i> after his interest had been transferred is in no way binding upon the transferee. Jakhomull Mehera v. Saroda Prosad Dey	... ..	604
"Putra, Pautradi, Santan" meaning of, <i>See</i> Deed, construction of	...	291

Ratification—Law of Agency—Indian Contract Act, Sec. 196.

Ratification with reference to the law of agency is applicable only to

Ratification,—(Contd.)

acts done on behalf of the ratifier as laid down in section 196 of the Indian Contract Act. **Raja Rai Bhagwat Dayal Singh v. Debi Dayal**

Sahu 335

Receipt—Agent—Ignorance, See Recognition 90

Recognition—Notice to quit.

When the agent of the grantor, in ignorance of the death of the grantee, granted rent receipts to the heirs in the name of the grantee :

Held, the receipts did not recognize the heirs as tenants and successors of the grantee, and it was not necessary to give them notice to quit before bringing a suit against them. **Syed Mahammad Khan v. Maharaja**

Nam Narain Singh Bahadur 90

Recognizance to keep peace, where justifiable—Indian Penal Code, Secs.

143, 379, convictions under, *See Criminal Procedure Code*, Sec. 106 ... 172

Record of Rights—Final publication—Settlement Officer, jurisdiction of—

Alteration of entry without presentation of plaint, *See Bengal Tenancy Act*, Secs. 195, 106, 108, 109A(3) 103

Redemption, effect of, on the plaintiff's right to pre-empt, *See Pre-emption* 318

—, *suit for—Mortgage deed, construction of—Compound interest—Maintenance cost—Enhanced Government revenue—Arrears of rent—Rent, statute barred or otherwise—Previous suit for possession—Account filed therein—Estoppel—Recovery of costs thereof.*

On the true construction of clause (4) of the mortgage-deed, which provided that 'in case of default in payment by me (mortgagor) of instalments of interest at the time herein appointed, the mortgagee shall have immediately on such default, power either to recover the whole of his principal, interest and (*sudmazid munafa mazkura*) further interest on the said interest according to the rate herein fixed : or the said mortgagee shall in default of payment of the instalment or instalments of interest aforesaid take possession of the mortgaged property,' their Lordships agreed with the lower appellate Court that the mortgagor was not liable for compound interest since the mortgagee entered into possession of the mortgaged premises.

Their Lordships upheld the concurrent finding of both the lower Courts that under the mortgage deed in this case, the mortgagee was entitled to get from the mortgagor over and above the usufruct of the mortgaged property, the amount paid by him on account of maintenance and enhanced Government revenue.

Under clause (10) of the mortgage deed in question, which provided that 'when-ever after the term of the mortgage or during the said term I (mortgagor) pay to the mortgagee in any *khali fasl* (fallow season) i.e., in the month of Jeith, the whole of the mortgage money and the whole of interest together with Government revenue, arrears of rent, and *takavi* advances due from tenants, and other expenses incurred under the terms of this document, without raising any objection of law such as limitation, etc., I, the mortgagor shall have power to redeem the mortgaged property,' their Lordships agreed with the lower Courts that the mortgagee was entitled against the mortgagor to arrears of rent due from tenants even where such arrears were statute-barred as against the tenants.

The mortgagee brought a suit against the mortgagor alleging that at the date of the suit there was due to him a sum of Rs. 33,087-13-3½ and praying for a decree for possession of the property or in the alternative for recovery of that sum with further

Redemption,—(Contd.)

interest. A Commissioner appointed to make up the accounts reported that Rs. 33,087-9-8½ were due to the mortgagee at the date of the suit. The Court in giving judgment held that there was no necessity for passing an order as to the amount due under the mortgage beyond saying that the account was correct and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It was contended by the mortgagee in a subsequent suit brought against him by the mortgagor for redemption of the mortgaged property, that the decree in the previous suit must be accepted as settling the amount due to the mortgagee on the date of that suit.

Held, by their Lordships, who adopted the conclusion of the lower appellate Court, that nothing had occurred in the previous suit to raise an estoppel against the mortgagor and, therefore, he might in the subsequent suit show if he could, that under the terms of the deed compound interest was not payable.

The mortgagee was not entitled to recover the costs of the previous suit in the absence of any provision in that behalf in the mortgage deed.

**Muhammad Naseem v. Mirja Muhammad Abbas Ali Khan and
Mirza Muhammad Abbas Ali Khan v. Muhammad
Naseem** 215

Reference, bad—Civil Court, duty of, *See* Land Acquisition Act. ... 445

Registrar, power of, to grant leave under cl. 12 of the Letters Patent, *See*
High Court, Letters Patent, 1865, cl. 12 441

Registration Act, Sec. 17—Judicial Proceeding.

The provisions of section 17 of the Registration Act (III of 1877), do not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or of orders made by Court when registration would be otherwise necessary. **Gobinda Chandra Paul v Dwarka Nath Paul** ... 492

Regulation VIII of 1819, Sec. 13 cl. (4) 604, 652

— VII of 1822, Sec. 10 cls. 3, 4, 5, 7, 8 460

— III of 1872, Sec. 11 101

Remand for rehearing—Trial on merits, *See* Civil Procedure Code, Secs.
108, 562 379

Rent, arrears of, due to co-sharer landlord—Suit by a co-sharer landlord
to recover the whole rent of the tenure—Refusal by other co-sharer
landlords to join as plaintiffs—Law applicable—Agreement to pay
shares of rent separately, effect of, *See* Bengal Tenancy Act, Sec. 188 ... 139

—, arrears of—Rent Statute barred or otherwise, *See* Redemption ... 215

—, deposit of—Bengal Tenancy Act, Sec. 61, Sub-sec. (2)—Onus, *See*
Bengal Tenancy Act, Sch. III art. 2(a) 251

—, due on the last day of Bhadra—Rent suits—Limitation—Fusli year,
See Bengal Tenancy Act, Sch. III art. 2(b) 106

—, due to members of joint Hindu family—Suit by some of the co-
owners, maintainability of—Claim joint and indivisible—Addition of
parties after limitation period—Limitation Act, Sec. 22, *See* Joint
Hindu family 251

—, enhancement of—Landlord, *See* Transfer of Property Act ... 284

—, failure to pay—Adverse possession, *See* Lessor and lessee ... 615

Rent , fractional share of, suit to recover—Separate collection, <i>See</i> Rent , suit for	512
—, non-realization of, effect of, <i>See</i> Landlord and tenant	202
—, payment of, to grantee of hebanama by the lessee—Lease executed by grantor after granting hebanama—Landlord and tenant, relation of, <i>See</i> Landlord and tenant , denial of relation	648
—, single suit for, maintainability—Separate holding—Aggregate area—Aggregate rent, <i>See</i> Bengal Tenancy Act , Sec. 148	96
—, suit for—Co-sharer landlord, <i>See</i> Landlord and tenant	425
—, suit for—Separate collection—Suit to recover fractional share of rent.	

One of the co-sharer landlords who used to collect his share of rent separately can sue to recover arrears of rent due to him in respect of his fractional share. **Girindra Chandra Pal Chowdhury v. Sree Nath Pal Chowdhury**

— suits—Limitation—Fnslee year—Rent due on the last day of Bhadra, <i>See</i> Bengal Tenancy Act , Sch. III art. 2(b)	106
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Rent Recovery Act, appeals under—Procedure—Civil Procedure Code (*Act XIV of 1882*), Secs. 560, 588—Applicability of Civil Procedure Code—*Act X of 1859*, Sec. 161—Complete Code—Transfer of brief—Pleader not named in vakalatnama—Adjournment—Hearing *ex parte*—Proper discretion.

Section 560 of the Code of Civil Procedure, and by necessary implication, section 588 also, are applicable to appeals under *Act X of 1859* by the operation of section 161 of the *Act*.

Quere—Whether the proposition that *Act X of 1859* is a complete Code in itself requires modification in view of the decision in *Nilmani Singh v Tara Nath Mukerjee*.

In an appeal before a District Judge, a respondent engaged two pleaders. On the day of hearing, the leader being ill had transferred his brief to another pleader whom the Judge declined to hear as his name did not appear in the vakalatnama. The junior not being instructed to argue, applied for a day's adjournment to get himself ready. This was refused and the appeal was decreed *ex parte* :

Held, the Judge had erroneously exercised his discretion. He ought either to have allowed the pleader, who appeared, to argue the case or allowed an adjournment, making if necessary, an order for costs in favour of the appellant. **Hare Krishna Mahanti v. Bishun Chandra Mahanti** 426

—, if complete Code, *See* **Rent Recovery Act**, appeals under 426

Renunciation of relation—Plea of dispossession by third person, *See* **Landlord and tenant**, denial of relation 648

Repealed Act, Court's power to look at, in construing, when, *See* **Statute**, interpretation of 563

Representation—Transferor—Subsequent acquisition of rights—Estoppel, *See* **Transfer of Property Act**, Sec. 48 381

"**Representative**" who is—Beneficial owner, *See* **Civil Procedure Code**, Sec. 244 299

Resjudicata—Civil Procedure Code, Sec. 13—Remission of grant, if in perpetuity—Set off—Character of land—Revenue Courts,

Per Stephen J.—Where in a previous litigation the question was whether the heirs of the grantee were entitled to claim the remission of rent and the same question,

Resjudicata,—(Contd.)

that is, as to a permanent remission of rent is raised in a subsequent litigation by the transferees from the representatives of the original grantee, the decision in the former litigation does not amount to *res judicata*.

Per Mookerjee J.—The Revenue Courts are Courts of limited jurisdiction, and notwithstanding the decision of the Collectorate Court, a suit may be brought in the ordinary Civil Court to establish the character of the land in suit, that is whether it is rent-free or rent-paying; in other words, the Revenue Court and the Civil Court are not Courts of concurrent or equal jurisdiction for the purposes of a suit to declare finally, whether the land is rent-free or liable to pay rent.

A decision of the Revenue Court may be evidence, but it is by no means conclusive upon the issue whether the land is rent-free or rent-paying.

But the presumption may be rebutted, either by the express provisions of the grant, or where the terms of the original grant are unknown, by long course of conduct of the parties concerned. **Rameshar Koer alias Dulpin**

Saheba v. Gobardhan Lal 202

————— *Civil Procedure Code (Act XIV of 1882), section 13.*—“*Competent to try such subsequent suit, or the suit in which such issue has been subsequently raised,*” meaning of—*Court of competent jurisdiction—Original or Appellate Court—Competency in regard to the whole or part of subject matter of litigation.*

Under the present Civil Procedure Code (Act XIV of 1882), in order to establish the plea of *res judicata*, it has to be shown that the Court of concurrent jurisdiction which decided the former suit, was a Court of jurisdiction competent to try the subsequent suit.

In order to establish the plea of *res judicata*, the Court which decided the former suit must have been such a Court as would have been competent to try and decide not only the particular matter in issue in the subsequent suit but also the subsequent suit itself in which the issue is subsequently raised.

It is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which the suit was ultimately decided on appeal. **Shibu Raut v. Behan Raut** ... 470

————— *Matter directly and substantially in issue—Rent payable entirely in cash or partly in cash and partly in kind—Bengal Tenancy Act, Sec. 69, See Civil Procedure Code, Sec. 13* 251

————— *Civil Procedure Code (Act XIV of 1882), Sec. 13, Expl. II—“Ought to have been made a ground of defence.*

The defendants were the proprietors of the entire village Sajiball.

In execution of a Small Cause Court decree obtained against them by the father of plaintiffs Nos. 5, 6, 7 and the brothers of the other plaintiffs, the entire village was sold on the 7th May 1890 and purchased by the decree-holder.

Subsequently, an ancestor of the plaintiffs brought a mortgage suit against defendants 2, 3, and 4, obtained a decree and in execution thereof purchased 49½ bighas of land in the village on the third January 1897.

On the 30th September 1899, defendants 2, 3, and 4 brought a suit to have the Small Cause Court decree and sale thereunder set aside.

On the 13th January 1900, they brought another suit to have the mortgage decree and sale set aside. This suit was dismissed for default. The first suit was decreed and the Small Cause Court decree and sale set aside.

Resjudicata,—(Contd.)

Plaintiffs applied under the Land Registration Act to have their names registered as proprietors of 49½ bighas, and on their application being refused by the Collector and Commissioner, brought the present suit, which was resisted on the ground that in their defence to the suit to have the Small Cause Court decree set aside, they ought to have put forward their purchase under the mortgage decree and they having failed so to do, their suit was barred by the operation of Expl. II to section 13 of the Civil Procedure Code:

Held, the suit was not barred.

Per Brett J.—As the two causes of action were not and could not have been joined by the defendants in the same suit, it was not obligatory upon the plaintiffs to make their claim under the mortgage decree a ground of defence in the suit to have the other decree set aside. **Mahabir Tewari**

v. Purbhoo Nath Chowbey 504

———— *Civil Procedure Code, Sec. 13—Decree, not giving relief against party, when binding.*

A decree made against a party in a previous suit in which the genuineness of a mortgage was established in his presence, but no relief was awarded as against him, because it was alleged that he had no interest in the equity of redemption, is binding on him in subsequent suits when he seeks to make out that it was he who was interested in the property and not the mortgagor. **Baleswar Bagarti v. Bhagirathi Dass** ... 563

Resistance or obstruction—Commissioner to partition—Possession, delivery of, *See Civil Procedure Code, Sec. 331* 98

Restoration of articles, not identified, and when no conviction of theft, illegal, *See Indian Penal Code, Sec. 448* 175

———— of house to complainant, where criminal trespass is not attended by criminal force, illegal—Criminal Procedure Code, Sec. 522, *See Indian Penal Code, Sec. 448* 175

Resumption, effect of—Chaukidari Chakran lands—Sub-lease before Resumption—Zemindar—Chaukidar, *See Chaukidari Chakran Act, Sec. 51* ... 85

Revenue, meaning of, *See Tanki-tenure* 460

Revenue authorities—Competency of Civil Courts to reconsider actions of, *See Land Registration Act* 395

Revenue Sale Law, Secs. 13, 14, 53, 54 of the—Sale of a share of an estate, effect of—*Encumbrance—Difference between language and scope of sections 53 and 54 of the Sale-law.*

A purchaser under section 13 of the Revenue Sale Law (Act XI of 1859) does not acquire merely the right, title and interest of the defaulting proprietor, but he takes the share itself which is exposed for sale, subject to the limitations prescribed in the section.

The words "shall not acquire any rights" in section 54 of the Act refer to the acquisition of rights in respect of interest, such as encumbrances, or the like, which are referred to in the previous phrase of that section.

If a person acquires the interest of the original owner of the estate *before the default is made*, his interest cannot be said to be an encumbrance, and passes by the sale to the purchaser, because what is sold is in essence his share in the estate.

The words, "purchaser shall not acquire any rights which were not possessed by the previous owner or owners" in section 54 of the Act, do not mean that, the pur-

Revenue Sale Law,—(Contd.)

chaser at the revenue sale shall only acquire the rights possessed by the previous owner or owners at the date of the sale, but that the purchaser shall not acquire any rights not possessed by the previous owner or owners at sometime or another, and shall acquire no more than what was the property of the previous owner or owners.

The purchaser at a sale for arrears of revenue of a share of an estate under section 13 does not take the property subject to encumbrances created after the date of the default and before the date of the revenue sale.

A purchaser of the interest of the proprietor after default and before revenue sale, is quite as much bound by the revenue sale as the proprietor himself, because in substance, he occupies the position of the proprietor.

Although the purchaser does not take subject to any encumbrances created after the default, he takes subject to such encumbrances only as have been created before default and are in actual existence, because undischarged, or though discharged on the date of the revenue sale, may, upon equitable principles, be allowed to be set up.

The language and scope of section 53 are materially different from those of section 54 of the Act; under the one section, the purchaser takes subject to all encumbrances existing at the time of sale, while under the other, no encumbrance created after default is binding on the purchaser. **Bhawani**

Koer v. Mathura Prasad 1

—————, *Secs. 27, 54—Title of purchaser, when vests—Title, when complete—Sale certificate, evidence of title—Purchaser takes subject to encumbrances—Power of proprietor to deal after default—Mortgage of non-existent property.*

Under section 27 of the Revenue Sale Law the title automatically vests in the purchaser at the revenue sale by reason of the sale and payment of purchase money. It becomes complete as soon as the sale became final and conclusive even though possession is not obtained. The certificate of sale does not create title, it is merely evidence of title.

The purchaser of a share of an estate under section 54 of the Revenue Sale Law takes the share subject to encumbrances which were in existence on the date to which the title relates back (that is, the day after that fixed for the last day of payment) and were in force on the date of sale.

The power of the proprietor to deal with his property is not lost by reason of the default in payment of revenue; if no sale was held by the Collector on the basis of such default, a mortgage created by the owner after default is not inoperative. **Khobhari Singh v. Ram Prasad Roy** ... 387

—————, *Sec. 29—Amount due from tankidar and payable to Government—Sale by Collector for Government dues, if legal, See Tanki-tenure* 460

—————, *Secs. 53, 54, language and scope of, difference between, See Revenue Sale Law, Secs. 13, 14, 53, 54* 1

Revenue Survey maps, evidence of title.

The Revenue Survey maps are evidence of title and possession, and till that evidence is rebutted by other evidence of title, effect should be given to the state of things as indicated by the Revenue Survey maps. **Mirza**

Shamsher Bahadur v. Kunj Behari Lall 414

Reversioner, suit against, by person claiming title from limited owner, what to prove, See Female heir 385

Review —Insolvency proceeding— <i>Experts</i> order, setting aside of, <i>See</i> Civil Procedure Code, Secs. 108, 350, 623 ...	268
Right to sue suspended, period during which, whether allowable, <i>See</i> Limitation Act, Sec. 14 ..	59
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Saleability , question of—Execution—Decree directing sale of nij jote lands—Mortgagor-judgment-debtor if competent to raise, <i>See</i> Execution of mortgage decree ...	101
Sale-Certificate , evidence of title, <i>See</i> Revenue Sale Law, Secs. 27, 54 ...	387

....., if necessary to be filed in suit for establishment of title by auction-purchaser.

A purchaser of immovable property at an execution sale can establish his title by evidence independently of the sale certificate; a sale certificate is not the title, but merely the title-deed. **Tantardhari Sing v. Sundar**

..... **Lal Missir** ... 384

..... *Appeal—Order refusing to grant—Civil Procedure Code (Act XIV of 1882), section 244—Decree-holder, auction-purchaser—Party—Execution, relating to.*

No appeal lies against an order refusing to grant a certificate of sale to the decree-holder, auction-purchaser, the question determined being not one relating to the execution, discharge or satisfaction of the decree.

The auction-purchaser being also decree-holder is a party to the suit within the meaning of section 244 of the Civil Procedure Code. **Jagarnath**

..... **Marwari v. Kartick Nath Pandey** ... 436

Sale by puisne mortgagee of property not mortgaged, validity of, where to be questioned, *See* Execution proceedings ... 370

Sambalpur, High Court's Jurisdiction over, *See* Governor-General's authority to place ... 563

Sanad, construction of—*Moharari*, grant of.

On the construction of the *sanad*, which recited that by a previous grant, Rs. 72 had been fixed as the annual horse expenses of the lessee to be paid out of *moharari* rent of Rs. 250, and as the lessee had with the consent of the donor taken a transfer of the *moharari* interest, the sum of Rs. 72 was to be annually set off against the *moharari* rent, and the remainder Rs. 178 was remitted for the kitchen expenses of the lessee and for feeding the poor and occasional visitors and which concluded with the following statement, viz., "This *sanad* is, therefore, granted to Shah Pir Mahomed Saheb, as regards the remission of Rs. 250 being the amount of *moharari* rent of mouza Kaler, and according to this *sanad*, the Shah Saheb as well as his heirs shall get acquittances year after year from my *outchery* :

Held, that there was no maintenance grant in perpetuity to the lessee or donee and his descendants from generation to generation, nor was there even a maintenance grant to the donee and his heirs, but that there was a maintenance allowance granted to the donee and his heirs then living.

A maintenance grant is *prima facie* for the life of the grantee. **Rameshar Koer alias Dulpin Saheba v. Gobardhan Lal** ... 303

Sanction—Complaint—Criminal Procedure Code, Sec. 196, *See* Indian Penal Code, Sec. 124A ... 49

Sanction requisites of—Criminal Procedure Code, Sec. 195(4)—False information—Indian Penal Code, Sec. 211—Criminal Procedure Code, Secs. 195, 476, <i>See</i> Sanction to prosecute	...	...	...	373
———— to prosecute when to be given—Case not false in substance—False evidence—Indian Penal Code, Secs. 196, 211, <i>See</i> Criminal Procedure Code, Sec. 195	...	...	...	169

Sanction to prosecute—*Criminal Procedure Code (Act V of 1898), sections 195, 476—False information—Indian Penal Code (Act XLV of 1860), section 211—Requisites of sanction—Criminal Procedure Code, section 195 (4).*

A false information was given at a Thana regarding the death of a girl. The informant, the chowkidar was directed to be prosecuted under sections 182 and 211 of the Indian Penal Code.

On an application by the opposite party, the Sessions Judge sanctioned the prosecution of two other persons by the following order :

"There can be no doubt that D. and A. instigated the chowkidar to lodge this information. I direct that they be prosecuted under section 211 with the chowkidar ":

Held, the sanction was without jurisdiction and bad. **Dharmadas**

Kawar v. King Emperor 373

Santan, meaning of, *See* Deed, construction of 291

Secundum Allegata et probata, *See* Bengal Tenancy Act, Sec. 87 78

Security, order for, by appellate Court—Conviction—Restriction of powers, *See* Criminal Procedure Code, Sec. 106(3) 603

———— for costs—*Suit by pauper—Civil Procedure Code, Secs. 380, 410.*

No security for costs ought to be demanded from a person who has been allowed to sue as a pauper. Section 380 of the Civil Procedure Code does not apply to the case of a person who has been allowed to sue as a pauper under section 410 of the Civil Procedure Code. **Musammatt Hafisan**

v. Abdul Karim 312

Services, faithful, *See* Grants, construction of 90

Settlement—Distinction between cls. 3, 4 and 5 and cls. 7 and 8 of section 10 of Regulation VII of 1822, *See* Tanki tenure 460

————, nature of, *See* Tanki tenure... .. 460

Settlement Court, decisions of—Suit, maintainability of, *See* Execution of mortgage decrees 101

Settlement officer, jurisdiction of—Record of rights—Final publication—Alteration of entry without presentation of plaint, *See* Bengal Tenancy Act, Secs. 105, 106, 108, 109A (3) 103

"**Shall not acquire any rights.**" meaning of—Sec. 54 of the Revenue Sale Law, *See* Revenue Sale Law, Secs. 13, 14, 53, 54, 1

Shebaitship, if alienable by will—*Hindu Law.*

Shebaitship is not alienable by will. **Rajeswar Mullik v. Gopeswar**

Mullik 315

Shebait, decrees against—Possession, suit for—*Meane profits—Idol's property, liability of—Shebait, position of.*

Where in a suit for possession in which the defendant set up the title of an idol, a decree was passed against the defendant as shebait, which made him liable for meane profits :

Shebait,—(Contd.)

Held, that the decree was not against the shebait in his personal capacity and the property of the idol was liable to make good the claim for meane profits.

Per Doss J.—The possession of a *shebait* is that of a manager. He is not only empowered but bound to do whatever is necessary for the benefit or preservation of its properties.

The liability of the estate of an idol for wrongs committed by its shebait in the reasonable management of its properties, is analogous to the liability of a corporation for wrongs committed by its agents in the course of their employment, and for the apparent furtherance of its purpose. **Raja**

Pramada Nath Roy v. Shebait Purna Chandra Roy	514
Shebait , position of, <i>See</i> Shebait, decree against	514
———, personal decree against—Claim to attached property on behalf of idol, if triable in execution proceedings, <i>See</i> Civil Procedure Code, Sec. 244	537

Signature as witness, if creates liability.

The fact that a son of the deceased mortgagor signed the mortgage bond as a witness does not render him liable as if he were one of the mortgagors.

Bhagawat N. Chowdhury v. Suba Lal Jha	193
Silence , <i>See</i> Estoppel	604
Sister's daughter's son , if heir—Dayabhaga School, <i>See</i> Succession Certificate	555
Sonthal Pergunnahs Regulations , Sec. 11—Settlement Court, decisions of—Suit, maintainability, <i>See</i> Execution of mortgage decree	101
Specific Relief Act , Sec. 9—"Dispossessed otherwise than in due course of law," meaning of—Criminal Procedure Code (Act V of 1898), Sec. 145, effect of an order under—If dispossession within the meaning of Sec. 9, Act I of 1877.	

The plaintiff sued for recovery of possession of a mica mine under Sec. 9 of the Specific Relief Act, on the allegation that he was dispossessed by the defendant, therefrom on the 18th February, 1907, in consequence of the final order of the Magistrate of Giridih, passed under Sec. 145 of the Criminal Procedure Code, on the 11th February, 1907, after the property had been in attachment under the proviso to clause (4) of the section ;

Held, that, under these circumstances, the plaintiff could not be said to have been dispossessed otherwise than in due course of law, and the plaintiff is, therefore, not entitled to maintain an action under Sec. 9 of the Specific Relief Act.

Although Sec. 145 of the Criminal Procedure Code does not expressly authorize the Court to put the successful party into possession, the effect of it is to entitle him to take it.

Per Mookerjee, J.—A matter may be considered to have happened in due course of law, if it is the result and operation of the law, invoked by the ordinary method of any judicial proceeding.

The view that the effect of an order under Sec. 145 of the Criminal Procedure Code is to entitle the successful party to take possession is consistent with the observations of the Judicial Committee in *Denomoni Chowdhurani v. Brojomohini Chowdhurani* and by the case of *Kalee Chander v. Adoo Sheikh*. **Leo Moore v. Manranjan Guha**

Standing timber —Moveable and immovable property—Indian Registration Act, Sec. 3—General Clauses Act, Secs. 3 cl. 25 and 4—Civil Procedure Code, <i>See</i> Forest right.	152
Statute 24 and 25 Viot. c. 104, <i>See</i> Governor General's authority to place	563
Statute 28 and 29 viot. c. 15, Sec. 3, <i>See</i> Governor General's authority to place	563

Statute, interpretation of—*Repealed Act, Courts power to look at, in construing, when.*

Per Mookerji J.—Although a repealed Statute has to be considered as if it had never existed, this does not prevent the Court from looking at a Repealed Act in *pari materia* on a question of construction; when the provisions of a Statute, as to the scope of which there is room for reasonable doubt, have to be construed, reference may legitimately be made to the previous history of the law on the subject. But it is only when the Statute or its phraseology is ambiguous and such as to admit of two meanings that a historical investigation of this kind is permissible. **Baleswar Bagarti v.**

Bhagirathi Dass 563

Statutory lien. if can be created by consent—Provision of law to be strictly complied with, *See* Putni Regulation, Sec. 13 cl. (4) ... 604

—Treatment by landlord as a usufructuary incumbrancer, *See* Putni Regulation, Sec. 13 cl. (4) 604

Striking off and dismissal of application, difference between, *See* Mesne profits, application to determine 301

Sub-lease before resumption—Choukidari chakran lands—Resumption, effect of—Zemindar—Choukidar, *See* Choukidari Chakran Act, Sec. 51... 85

Substantive rights, change of, and not of procedure—Central Provinces Rent Law, Sec. 43—Central Provinces Tenancy Act of 1898, Secs. 45 cl. 3, 47—Occupancy holding, transfer of part of, *See* Jurisdiction, when exclusive 499

Substitution of heirs not made in time—Parties necessary—Abatement of suit, *See* Partnership 266

Succession Certificate—*Sister's daughter's son, if heir—Dayabhaga School of Hindu Law.*

Sister's daughter's son is not *prima facie* an heir under the Dayabhaga Law and is, therefore, not entitled to get a succession certificate under Act VII of 1889. **Krishna Pada Dutt v. Secretary of State for India in Council** 555

Succession Certificate Act section 4—*Debt, meaning of—section 90 of the Transfer of Property Act (IV of 1882), application under, for money decrees—Debt when accrues due—Applicant plaintiff—Execution of decrees—Nature of joint family debt if to appear on the face of the bond—Joint family debt.*

In a legal sense a debt is either a liquidated money demand or a liquidated sum due.

Section 4 of the Succession Certificate Act is mandatory. If the matter of non-production of Succession Certificate is brought to the notice of the Court in time, it is the duty of the Court to stay its hand and to give effect to the clear legislative intent.

The amount in respect of which a personal decree under section 90 of the Transfer of Property Act is sought is a debt within the meaning of section 4 of the Succession

Succession Certificate Act, —(Contd.)

Certificate Act. It accrued due on the date for repayment mentioned in the mortgage bond. It is not a case of a succession opening out during the pendency of the proceedings in Court, but a case between plaintiff and defendant.

It is not necessary that the debt claimed should appear on the face of the bond that it is a joint family debt; it is enough, if it is admitted or proved that the family is joint. If the debt is a family debt and such a debt has vested by right of survivorship no succession certificate need be produced.

Sahadev Sukul v. Sakhawat Hossain	658
Suggestion made by the prosecutor without evidence to support it—Judge, duty of <i>See</i> Misdirection	246
Suit , barring of—Estate under the Encumbered Estate Act, <i>See</i> Chhota Nagpore Encumbered Estates Act, Sec. 3(3) (c)	578
—, frame of—Ejectment, suit for, <i>See</i> Tanki-tenure	460
—, by some of the co-owners, maintainability of—Rent due to members of joint Hindu family—Claim joint and indivisible—Addition of parties after limitation period—Limitation Act, Sec. 22, <i>See</i> Joint Hindu Family	251
—, maintainability of—Decisions of Settlement Court, <i>See</i> Execution of mortgage decree	101
—, maintainability—Co-sharer landlord—Rent, suit for—Co-sharers made defendants, <i>See</i> Landlord and tenant	425
—, to enforce agreement to pay deretal amount by instalments if maintainable, <i>See</i> Civil Procedure Code, Sec. 257A	543
—, to set aside award—Court-fee, <i>See</i> Civil Procedure Code, Sec. 283	36
—, to set aside summary proceeding—Court-fee, <i>See</i> Civil Procedure Code, Sec. 283	36
—, frame of—Possession, suit for—Zemindar and Ptnidar—Resumption by Government and subsequent settlement with Zemindar, <i>See</i> Chaukidari Ohakran land	439
Suit for declaration and injunction —Consequential relief, <i>See</i> Civil Procedure Code, Sec. 283... ..	36
Suit for establishment of right under Sec. 283, Civil Procedure Code—Value of suit, <i>See</i> Civil Procedure Code, Sec. 283	36
Suit to recover tenure — <i>Chhota Nagpore Landlord and Tenant Procedure Act, Sec. 37</i> —Denial of tenant's title by landlord—Limitation Act (XV of 1877), Sec. 14, Sch. II, Arts. 138, 142—Exclusion of time—Non-mention of claim to extension in the plaint, not fatal.	

A suit to recover a permanent tenure by the auction-purchaser from tenant in which the landlord defendant denies the title of the plaintiff on the ground that on the death of the previous tenant the land reverted to him does not come under section 37 of the Chhota Nagpore Landlord and Tenant Procedure Act and is triable by the Civil Court. To such a suit Art. 143 and not Art. 138 of Schedule II of the Limitation Act is applicable.

In computing the period of limitation, the time during which a suit remained pending in a Court not having jurisdiction to entertain it is to be excluded under section 14 of the Limitation Act. The non-mention of a claim to that extension of the period in the plaint, presented to the proper

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The word "revenue," as defined in Act VII of 1868, (B. C.) includes every sum annually payable to the Government by the proprietor of an estate or tenure in respect thereof; and the word "proprietor," includes any tenant by whom any estate or tenure is held directly under the Government.

Upon the disappearance of the zemindars who held the tenures (*tanki tenures*) directly from the Government under successive temporary settlements, upon their refusal to take fresh settlements at the time of a re-settlement, the *tankidars* came into direct relations with the Government and became proprietors of the tenures which were thenceforth held by them under the Government within the meaning of section 1 of Act VII of 1868, (B. C.) and the sum annually payable by them in respect of the tenures would be rightly described as revenue, within the meaning of the same provision of the law; and the Collector has ample authority to bring such tenures to sale under the provisions of Act VII of 1868, (B. C.)

If the *tankidars* in a body are the tenure-holders liable for the payment of the Government revenue, each of them *prima facie* has to contribute a portion of the sum payable. The payment of such sum by any *tankidar* is payment by him in his character as a member of the body of *tankidars*; merely because he cultivates the land in the occupation, he cannot be regarded as a cultivating raiyat under the entire body of *tankidars* which includes himself as a member. The *tankidars* cannot therefore be regarded as occupancy raiyats protected from eviction under section 14 of Act VII of 1868, (B. C.)

The cause of action of a plaintiff suing in ejectment cannot be affected by the title under which the defendant prefers to hold possession. What concerns the plaintiff is that another is wrongfully in possession of what belongs to him and that fact gives him his cause of action. What the plaintiff is entitled to claim is the recovery of possession of the land as a whole and not in fragments, and all persons who oppose him in the enforcement of that right are concerned in his cause of action and ought accordingly to be made parties to the suit in which he seeks to eject them, and particularly so, when they combine to keep him out of possession.

It cannot be affirmed as a matter of law that upon default of payment by a *tankidar*, the entire village is liable to be brought to sale so as to destroy the rights of all the tenure-holders. The question depends upon the circumstance whether the

Tanki-tenure, —(Contd.)

settlement originally was under clauses 3, 4 and 5 or under clauses 7 and 8 of section 10 of Regulation VII of 1822.

The fundamental distinction between the two kinds of settlement is that in the case of a settlement under clauses 2, 3 and 4, the settlement is made with a Sudder Malguzar who represents all the persons interested in the property, and his default makes the entire tenure liable for sale unless there is a provision to the contrary in the settlement; and in the case of a settlement under clauses 7 and 8, there is a settlement with a selected person as Sudder Malguzar, but his default does not make the entire tenure liable to sale, unless there is a specific provision to the contrary in the settlement.

A settlement can be made under clauses 7 and 8 only in the case of cultivating proprietors who hold their tenure in <i>putteadari</i> or <i>bhyacharee</i> or similar form. <i>Bandhu Acharja v. Nathni Bahar Singh</i> ...	460
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Although an auction-purchaser does not acquire a full title till the confirmation of the sale, yet upon general principles, he may have equitable rights, arising out of his purchase, before the date of confirmation of the sale.

Scope of section 316 of the Civil Procedure Code examined,

Although the title to the property sold vests in the purchaser from the date of the confirmation, he does not acquire the right, title and interest of the judgment-debtor as they stand on that date. If he has purchased in execution of a money decree, he takes the property as it stood on the date of attachment and is not affected by any subsequent dealings therewith on the part of the judgment-debtor. If he has purchased in execution of a decree on a mortgage, he takes the property as it stood on the date of the

Title of auction-purchaser, when accrues,—(Contd.)

creation of the mortgage and persons who have subsequently become interested in different fragments of the equity of redemption cannot claim a superior title. **Bhawani Koer v. Mathura Prasad** 1

Title-deed—Auction-purchaser—Suit for establishment of title, *See* Sale certificate 384

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— of Property Act—*Lease*—*Rent*.

The Transfer of Property Act gives no authority to a landlord to enhance the rent of his tenant during the term of the lease, whether it be in perpetuity or for a definite term. **Satis Chunder Chattopadhyaya v. Rai**

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—, Sec. 2—Non-permanent tenure created before the passing of Transfer of Property Act, if transferable, *See* Ejectment 553

—, Sec. 43—*Estoppel*—*Representation*—*Transferor*—*Subsequent acquisition of rights*.

The rule of law underlying Sec. 43 of the Transfer of Property Act is that, as between the transferor and the transferee, the transferor cannot plead subsequent title to the land transferred, if he had induced the transferee to pay money for the transfer. The principle is an extension of the rule of estoppel.

Where a person who had merely a *ghatwali* interest in certain land, mortgaged it on the representation that it was his *jaigir* and he subsequently got a *mokarari* title to it :

Held, that on a decree for sale upon the mortgage, the *mokarari* interest of the mortgagor passed to the mortgagee. **Mokhoda Debi v. Umesh**

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—, Sec. 53—*Defeating or delaying creditors*—*Considerations for transfer separable*—*If whole transfer void*.

A transfer of property, the considerations for which are separable, part being for valuable consideration and part for the intention to defeat or delay other creditors, is valid and enforceable with regard to the part which is for valuable consideration.

A mortgage was executed for a total sum of Rs. 8,500. It was found that Rs. 4,853 was actually advanced by the mortgagees, the evidence as to the balance Rs. 3,647 was extremely suspicious and seemed to be for the purpose of delaying another creditor who had obtained a decree on a *hatchitta*.

Held, there ought to be a mortgage decree on the footing of Rs. 4,853 being the principal money secured. **Rajani Kumar Das v. Geur**

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Transfer of Property Act, Secs. 58, 59, 100—Mortgage and charge, difference between.

The Transfer of Property Act contemplates a difference between mortgages and charges, though, no doubt, the mode of granting relief and the nature of the relief that may be granted are similar, because a decree for sale is the only relief that may be granted for the enforcement of a charge.

A mortgage is a transfer of an interest in specific immovable property; a charge only secures payment of money out of that property. Either may be created by act of parties, but when the "transaction does not amount to a mortgage," and does not therefore operate as a transfer, it is a charge on immovable property. A document which only gives a right to payment out of a particular property without transferring it, creates a charge.

If an instrument is expressly stated to be a mortgage and gives the power of realization of the mortgage money by sale of the mortgaged premises, it should be held to be a mortgage. The fact that the necessary formalities of due execution were wanting would not convert the mortgage into a charge. If, on the other hand, the instrument is not, on the face of it a mortgage, but simply creates a lien, or directs the realisation of money from a particular property, without reference to sale, it creates a charge. **Gobinda**

Chandra Paul v. Dwarka Nath Paul 492

Mortgages, Sec. 82—Marshalling—Contribution—Mortgagor and

There is nothing in the provisions of the Transfer of Property Act to support the view that as between a mortgagee and the holders of the equity of redemption, the mortgagee is bound to distribute his debt rateably upon the mortgaged properties. **Hara Kumari Chowdhurani v. Eastern**

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Wahibs, right of worship in mosques built by Hanafis.				

The Wahabis, although holding different views in the matter of ritual, have a right to worship in the mosques, built by Mussulmans of the Hanafi sect primarily for the use of their own sect, provided in the exercise of the right of worship they do not interrupt or disturb the worship of others.

Abdus Subhan alias Mehral v. Kurban Ali and Umar Karim v. Hedaitullah

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Will construction of—Will, operative part of—"Possessor of properties," meaning of—Widow, Hindu—Life-interest—Absolute gift—Powers of alienation by gift or sale—Gift over—Limitations imposed by will, effect of—Construction, rule of

Where in the recitals of a will, a Hindu testator mentioned that he had no sons but only one daughter, whom he had given in marriage, but it was his duty to maintain her, and that his wife, to whom the will was addressed, was entitled to the property to be left by him, and then in the operative part of the will directed as follows :—

"Should I die, you (his wife) shall under this will, become possessor of my properties &c.,..... you will have the right and power to alienate by gift or sale all the movable and immovable properties....."

"My daughter shall become entitled to and possessor of whatever properties will remain after your death, and she shall enjoy the same..... The said daughter shall have the same rights in the aforesaid properties as you have, and he to whom my said daughter may willingly give away these properties, shall possess the same and enjoy them....."

Held, (upon a construction of the will).—That there was not, in so many words, any clear and absolute gift to the widow, that the widow took for life, with a power

Will,—(Contd.)

of alienation, but to the extent to which such power was not exercised that the daughter similarly took the property and that she was to have the "same rights in the properties," as the widow.

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MALIKANA ALLOWANCE.

The exact origin and nature of the charge called *malikana* are matters involved in obscurity. The term *malikana* is derived from *malik*, the arabic word for "owner" or "proprietor" and it means an allowance for proprietary rights given by Government to proprietors who decline to engage the *jamas* proposed to them under the Regulations of 1793, and whose lands were, in consequence, let in farm or held *khas* by Government. But it appears from MacNeile's memorandum on the Revenue Administration of the Lower Provinces (1873) that in the Behar Districts the payment of *malikana* dates from a period long anterior to that of the Permanent Settlement. Mr. Shore had endeavoured to trace the origin of the system and he supposed it to have arisen from the custom established in that province of dividing the produce between the cultivator and Government in order to afford the proprietor of the soil a proportion of the produce, which, under such an usage strictly enforced, he could never receive without some authorised allowance in his favour. In other words, those "proprietors" who were in receipt of *malikana* in Mr. Shore's time, had been already shelled with hereditary pensions amounting to a certain percentage on the rental of their estates, rental and revenue being then synonymous; Mr. MacNeile is of opinion that the permanent settlement put an end to this system except in those cases where the proprietors declined the terms offered them, and preferred to remain out of possession. Such proprietors continued, as in other parts of Bengal, to receive *malikana* allowances under the rule above quoted. Mr. MacNeile adds further that "there were besides extensive lands in Behar, the Government share of the rental of which had been alienated by Royal and other grants. The proprietors of the lakheraj tenures were in receipt of *malikana* from the lakherajdars; and when subsequent resump-

* Mr. Shore's Minute of the 18 Sept., 1789.

tion operations were carried out, and a large number of these lakheraj estates were assessed to the public revenue, the lakheraj-dars remaining in possession, the *malikana* previously due from them was added to the Government Revenue, with which they were assessed, and has since been paid to the *maliks* from the treasury by the Collector.

So far as it can be traced the grant of *malikana* as stated above, originated at the time of the Settlement of the Public Revenue payable from the lands of the zemindars, independent talukdars, and other actual proprietors of land. The original rules for forming a decennial settlement of the revenue to be paid from the lands in Bengal, Behar and Orissa, passed for those provinces respectively, on the 18th September 1789, 25th November, 1789, and 10th February, 1790, having undergone considerable alterations during the progress of the arrangement, were re-enacted with modifications and amendments and codified by Regulation VIII of 1793. By section XLIV, it was declared that proprietors who may finally decline engaging for the jumma proposed to them, and whose lands may consequently be let in farm or held khas, are to receive *malikana* (an allowance in consideration of their proprietary rights) at the rate of ten per cent. on the sudder jumma of their lands, if let in farm, or at the same rate on the real collections from their lands if held khas, *viz.*, on the net amount realized by Government, after defraying the *malikana* as well as other charges. Thus it appears that whenever a proprietor refused to engage for the jumma offered, at the time of the settlement, his lands were either let in farm or held khas by Government and the proprietor was given an allowance in consideration of his proprietary rights, and this allowance is called *malikana*. And at the time of the Permanent Settlement of Bengal, Behar and Orissa, these proprietors whose lands were held khas or let in farm in consequence of their refusing to pay the assessment required of them under the Regulations for the decennial settlement, were given an opportunity of being restored to the management of their lands, upon their agreeing to the payment of the assessment which were or might be required of them. (Sec. V. Reg. I of 1793).

The above regulations for the payment of *malikana* were subsequently made applicable to the ceded and conquered Provinces including Cuttuck, Puttaspore and its Dependencies, by Regulation VII of 1822. Clause I, section V. of this Regulation enacts for those provinces

Present origin of
Malikana.

Its development.

that the proprietors of estates let in farm or held khas shall be entitled to receive an allowance of *malikana* at the rate of not less than five per cent. on the net amount realized by Government from the lands nor shall it exceed ten per cent. on that amount without the special sanction of the Governor-General in Council, provided where the proprietor has been called upon to state the highest amount of jummas for the payment of which he may be willing to engage and has stated the same accordingly, the sum so stated by such proprietor and not the jumma ultimately realized by Government, shall form the basis on which his *malikana* allowance shall be adjusted. These provisions were subsequently declared by section II of Regulation IX of 1825, to apply to all lands not included within the limits of estates for which a permanent settlement has been concluded and to all estate held khas. But section XI. of Regulation IX of 1833 declares the new provisions in section 5 of Regulation VII of 1822, to be only of prospective effect and to be applicable solely to the settlements made under that Regulation.

There is another kind of *malikana* which is generally found

Malikana land.

in Behar and the same is found in section XXXVII of Regulation VIII of 1793.

This is a grant of land instead of a grant of money allowance.

Malikana allowance.

The *malikana* allowance appears to be of two kinds :—

I. *Malikana* or proprietary allowance, granted for estates of which settlement is not made with the proprietors. This is fixed for the term of the settlement (a) when tender of settlement is made to the proprietor, and his offer is not accepted in which case the *malikana* is calculated on the amount of his offer, and (b) when tender of settlement is made to the proprietor, but the settlement is refused absolutely without any offer being made, in which case the net collections of ten years immediately preceding form the basis of the calculation of the *malikana*. In both these cases also the amount of *malikana* is not dependent on collections. *Malikana* is fluctuating (c) when settlement is not offered to the proprietor, the *malikana* being then calculated on the net collections of each year (1) ; and

II. *Malikana* which was allowed to zemindars in virtue of their right as proprietors, in consequence of the settlement of their estates or lands out of their estates with others. The *malikana* as generally found in Bihar falls under this class

(1) Regulation VII of 1822, Sec. V.

and is a compensation permanently granted to proprietors (*a*) on account of the settlement of their estates with others on their refusal, (*b*) for lands given out of their estates rent free to others by Royal or other grants and (*c*) for such lands which were subsequently returned and assessed to Revenue by Government and settled with holders. It is of a pensionary nature, and does not depend on collections.

The *malikana* of the first class is payable for a term of years only that is, during the currency of a settlement. In cases (*a*) and (*b*) the amount is fixed, while in case (*c*) it may vary from year to year. *Malikana* of the second class is permanent.

Besides the above there is a special kind of *malikana* created by clause nine of Sec XXXIII of Regulation XLIII of 1793. By that regulation, a grant of waste lands capable of being brought under cultivation with the least difficulty and at the smallest expense, was to have been made to invalid sepoys and native troops desirous of receiving such grants in lieu of their pay allowed to them and the original grantee held the lands rent free for life and upon his death, his lands are to be continued to his heirs-at-law, at a fixed jumma, upon an estimate of the *actual net* produce, after deducting one-tenth therefrom to be annually paid to the zemindar, as *malikana*. Should there be default in payment of the rent of Government and the *malikana* payable to the zemindar, the rights and privileges of the grantee are to be sold to the best bidder, for the liquidation of the demand against him.

Malikana on lands
given rent free to
Sepoys.

CASES AND COMMENTS.

Mansell

v.
Griffin
[1907.]
Nov. 9.

24 T. L. R.
67.

Contract—Theatre—Engagement of artist.

The defendants agreed to engage the plaintiff, who was an actor, for the principal part in pantomime at a salary of £130 per week for the first year, £140 a week for the second year, and £150 a week for the third year, with the option, in consideration of the engagement, of retaining the plaintiff's services on the same terms and conditions as set forth in the agreement for the following pantomime season.

Held, that the contract meant that, if the option was exercised, the weekly salary payable would be that which was payable for the third year, and that the contract was not void for uncertainty.

Way—Dedication—Lessee—Right to dedicate.

A lessee cannot dedicate a public right of way so as to affect the interests of the owner of the fee simple, or of those who purchase from the lessee without notice.

Held, also, on the facts, that there was no evidence upon which dedication by the lessee, assuming him to be the owner in fee, could be found.

Decision of Neville, J. (23 T. L. R., 366 ; [1907] 1 Ch., 704, varied.

Mansell

v.

Griffin

[1907.]

Nov. 9.

24 T. L. R.
67.*Master and servant—Illness of servant—Right of employer to terminate agreement.*

By an agreement, made in August, 1903, the defendants agreed to employ the plaintiff for a period of five years as their works manager. The agreement contained no provision enabling the defendants to terminate the agreement before the end of the five years. Towards the end of 1905 the plaintiff became ill and was absent from work from time to time. In January, 1906, his illness became more serious, and shortly afterwards he was medically examined and was told that he must have complete rest for a considerable time and undergo special treatment. It did not appear from the certificate of the doctor given at the time that the plaintiff would never be able to resume his work. As, by reason of his ill-health, the plaintiff continued to be absent from work, the defendants gave him notice in April, 1906, terminating the agreement, and they appointed one of their staff to act as works manager. By the middle of May, 1906, the plaintiff recovered and was fit for work. In an action by him for damages for breach of contract, Channell J., held that he was entitled to recover, inasmuch as the circumstances were not such as to justify the defendants in thinking that the plaintiff would never be able to perform a substantial part of the unexpired period of the agreement.

Held, that as the learned Judge had applied the true test namely, whether the illness was such as to put an end in a business sense to the engagement and to frustrate the object of the engagement—and having found as a fact that it did not, the Court would not interfere.

Decision of Channell J. (23 T. L. R. 306), affirmed.

Storey

v.

Fulham Steel
Works
Company

[1907.]

Nov. 14.

24 T. L. R.
89.

In re
Harrison
and another
[1907.]
Nov 21.

24 T. L. R.
118.

Solicitor—Counsel's fees—Counsel advising after action begun—Objection by client—Right of solicitor to charge fee to client.

The rules of etiquette as between members of the legal profession are not binding upon clients.

Therefore where a counsel had advised a client during the progress of an action, and the client expressly told the solicitor not to brief the counsel at the trial, and the solicitor, acting under Resolution 20 as to Bar Etiquette (Annual Practice, 1908, Vol. 2, p. 743), briefed the counsel at the trial and paid him his fees :—

Held, that the solicitor could not, upon taxation, charge his client with the fees paid to the counsel.

In re
Wagstuff

Wagstuff
v.

Jalland
[1907.]
Nov. 25.

24 T. L. R.
136.

Will—Husband and wife—Gift during widowhood—Wife not married to testator—Condition.

A testator, having gone through the ceremony of marriage with a married woman, made his will whereby he gave the income of his residuary estate to "my said wife during her life, if she shall so long continue my widow for her own use and benefit, and upon or after her decease or second marriage" upon trust for the children of the testator. The testator was never married to any other person, and at the time when he went through the ceremony of marriage he knew that his alleged wife had then a husband living.

Held, upon the true construction of the will, and having regard to the circumstances, that the married woman with whom the testator went through the ceremony of marriage was entitled, as his "widow" to the income of the testator's residuary estate, unless and until she contracted a marriage subsequent to the testator's death.

Decision of Kekewich J. (23 T. L. R. 426, [1907] 2 Ch., 35), affirmed.

Lowry
v.
Sheffield
Coal
Company Ltd.
[1907.]
Nov. 27.

24 T. L. R.
142.

Master and servant—Compensation for injuries by accident.

The appellant was employed as a collier by the respondents, and it was part of his contract of employment that the employers should pay him his wages at their pay office. The appellant left work on Saturday at 5 A. M. At 12-30 P. M. he was going for his wages along a path which had been made by the respondents for their workmen, and while going along a railway company's

line which ran through the respondent's premises, he was knocked down by an engine and injured.

Held, that he was injured "in the course of the employment" within section 1, sub-section 1, of the Workmen's Compensation Act, 1897, and was entitled to compensation.

Damages—Minerals, working of—Subsidence—Risk of further subsidence—Depreciation in value of land.

Where damage to land and buildings has been caused by the working of the minerals underneath, in assessing the damages recoverable from the mineral owner the depreciation in the market value of the land and buildings attributable to the apprehension of further subsidence caused by the past working cannot be taken into account.

Such further subsidence, if and when it occurs, gives a fresh cause of action to the surface owner.

Decision of the Court of Appeal (22 T. L. R., 521; [1906] 2 Ch. 22) reversed.

West Leigh
Colliery Co.
v.
Tunncliffe
and
Hampson Ltd.
[1907.]
Dec. 2.
—
24 T. L. R.
146.
—

REVIEWS.

The Bengal Tenancy Act—by R. F. RAMPINI, M. A., LL.D., AND J. H. KERR.—THIRD EDITION—S. K. LAHIRI & Co., CALCUTTA, 1907.—The edition of the Bengal Tenancy Act by Mr. Justice Rampini has in the past proved indispensable to every member of the profession. The additions and alterations made in the new edition will still further enhance its reputation. All the amendments made in the original Act up to the end of May last have been duly incorporated and the recent decisions are duly noted, though we have not been able to discover up to what date the reports have been dealt with; it would have been an advantage if the latest cases had been given in an addendum, as is usually done in other books. The introduction which is a new feature in this edition gives the history of the law of landlord and tenant and also analyses the provisions relating to the Record of Rights in the Bengal Tenancy Act. On the whole the new edition will maintain its position as the leading Commentary on the subject. It is superfluous to add that the get up of the work is worthy of the reputations of the publishers.

Death Duties—by C. BEATTY, SECOND EDITION—EFFINGHAM WILSON, LONDON 1907.—4s. Net.—The fact that this book has reached a second edition in less than two years proves convincingly that it has met a demand. The subject of Death Duties is extremely complicated and the book has the merit of being a simple and an intelligible guide to the authorities in the matter. In the new edition the cases have been brought up to date and the notes and forms show all the recent important change of practice. We have no doubt it would continue to be a favourite.

Hand-book of Jurisprudence—by TARINI DAS BANERJEE, M. A., B.L.—B. BANERJEE & CO., CALCUTTA 1907, RS. 1-8.—In this hand-book an attempt is made to analyse the fundamental notions of jurisprudence and to illustrate them by reference to English and Indian Cases. It is intended to be a guide to the leading text books and we trust law students for whom it is intended will not use it as a substitute for them.

The Provincial Insolvency Act—by RAJAGOPALA AYER, B. A., B.L.—S. R. KRISHNA ROW, MADRAS, 1907, RS 1-12.—This edition of the Provincial Insolvency Act gives the text of the Act together with notes of such English and Indian Cases as illustrate the sections which are borrowed in the main from the English Bankruptcy Act. The Comparative table and the Appendix which sets out the proceedings in Council will both be found useful.

CONSTITUTION OF THE HIGH COURT BENCHES.

From 2nd January, 1908.

Maclean, C.J., & Coxe J.—Presidency Group and Privy Council Department.

Rampini & Sharfuddin JJ.—Criminal Business.

Harrington & Holmwood JJ.—Regular Appeals of all Groups.

Brett & Chitty JJ.—Patna Group.

Stephen & Mookerjee JJ.—Burdwan Group.

Mitra & Caspersz JJ.—Rajshahye Group.

Woodroffe & Fletcher JJ.—Original Side.

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{ No. 2.

MALIKANA ALLOWANCE—(*continued.*)

We find that Regulation I of 1793 makes the malikana a proprietary right in the lands (1), while Regulation VIII of 1793 declare malikana to be an allowance in consideration of the proprietary right (2). Malikana is payable by the former monthly (3) according to the *kistbandi* fixed for the Sudder Jumma, with an exception to any cases in which it may have been otherwise stipulated with the farmers; and the payment (4) thereof is to be enforced by the Collectors by the same process as is prescribed for enforcing payment of arrears of the public Revenue, if they shall at any time neglect to pay. Relying upon this term, Chief Justice Peacock in the case of *Bhoobee Singh v. Mussamut Nehmoo Bohoo* (5) expressed a doubt without deciding, whether a suit will lie in a Civil Court for the recovery of malikana. Since this case, this question has not yet come for decision. By the same Regulation, Government makes itself a guarantee for the full payment of malikana (6).

Now having related the origin and history of malikana, we naturally seek to enquire what are its incidents. There has been a paucity of case-laws on the subject, except on the point of limitation.

The first question naturally arises, whether the proprietor in possession is entitled to malikana and section V, Cl. 2 of Regulation VII of 1822, clearly enacts that no malikana allowance is to be granted to such zemindars as may continue in the occupancy of their tenures, whilst the mehal in which they are included is held khas or farmed, or of any part of them,—that is to say, zemindars who may cultivate or lease

Proprietor in possession not entitled to malikana.

(1) Regulation I of 1793, Sec. XI, Art. X, Clause 2.

(2) Regulation VIII of 1793, Sec. XLIV.

(3) Regulation VIII of 1793, Sec. XLV.

(4) Regulation VIII of 1793, Sec. XLVI.

(5) 12 W. B. 498; 4 B. L. R. A. C. 29.

(6) Regulation VIII of 1793, Sec. XLVI.

their lands, and pay the revenue to the farmer or Government officer; nor without the special sanction of Government to any malguzar, zemindar, or other proprietor, or holder of land who may directly or indirectly continue to draw any allowance from the raiyats of the lands farmed or held khas. It was also held by Seton-Karr and Jackson JJ. in the case of *Sheikh Zahoor Huq v. Sheikh Morad Ali* (1), that old maliks, when allowed to receive malikana cannot get possession.

One important point in connection with malikana has been whether, its being payable to the proprietor, by the farmer or person in his place, it is a rent. Glover J. in *Bhoobee Singh v. Mussamet Nehmoo Bohoo* (2), says "malikana is in the nature of rent. It represents the profit of the proprietor derived from the rents of his estate and was so understood apparently by Government at the time of the Permanent Settlement." He concludes by saying "payment of malikana was enforced in the same manner as arrears of rent. Malikana, therefore, has all the elements of rent." But this view was dissented from by Mr. Justice Kemp, whose opinion prevailed when the case was referred to three other Judges whose judgment was delivered by Chief Justice Peacock (3), (Mr. Justice Jackson and Mr. Justice Macpherson concurring) who held that "malikana is not rent, nor has it the elements of rent. It is a right to receive a portion of the profits of the estate." The same view was taken by Mr. Justice Bayley, who held in the case of *Herranund Shoo v. Mussamut Ozeerun* (4), that malikana is not rent though Bailey J. in the same case held that malikana was in truth, very much of the nature of rent charge. It was held in *Heeranund Sahoo v. Mussamut Ozeerun* (5), that malikana was not rent.

It has been held by Bayley and Shumbhoo Nath Pandit JJ. in *Heeranund Sahoo v. Mussamut Ozeerun* (5) that malikana is not a recurring cause of action, when the case came for reconsideration for review (6).

Bayley J. observed that malikana is not rent due which would form a constantly recurring cause of action. In *Gopi Nath Chobey v. Bhugwat Pershad* (7), Mr. Justice Mitter concurring with Mr. Justice Norris observed: "In this case the plaintiffs are seeking to establish a periodically recurring right

(1) 1 W. R. 82

(4) 9 W. R. 102.

(2) 12 W. R. 46; 3 B. L. R. App. 103. (5) 6 W. R. 151 at 152.

(3) 12 W. R. 498; 4 B. L. R. A.O. 29. (6) 7 W. R. 336; See also 9 W. R. 102.

(7) I. L. R. 10 Calc. 708.

vis. a right to receive malikana annually, but there is also a further claim involved in the suit, because that right carries with it a right to the property itself, if the parties consent to take a settlement when the time for concluding the next temporary or permanent settlement comes. Therefore, it cannot be said that it is purely a suit to establish a periodical recurring right."

While in the case of *Hurmuzt Begum v. Hirday Narain* (1)

Malikana is an annual recurring charge.

it was held by Garth and Maclean J., that malikana was an annual recurring charge.

One of the main incidents of malikana is that it is an interest

Malikana is an interest in immovable property.

in immovable property. Phear J. says in *Herranund Shahoo v. Mussamut Ozeerun* (2), that the right to receive malikana constitutes

an interest in land, as it is a distinct proprietary right and in this view, he was supported by Bailey J. Chief Justice Peacock with Jackson and Macpherson JJ., also held that malikana was an interest in immoveable property. The same view was taken by Glover J. in *Gobind Chunder v. Ram Chandra* (3). Accordingly a suit to recover malikana

12 years' limitation.

is governed by 12 years' limitation (4).

But Glover J. (5) was of opinion that 3 years, limitation was applicable, but his opinion was dissented from by Mr. Justice Kemp (5), whose opinion prevailed when the case was referred to three other Judges (6). It has further been held in *Gopi Nath Chobey v. Bhugwal Pershad* (7) that a suit to establish a right to certain malikana money must be brought within 12 years; as the rule of law, that a person, entitled to an interest in immovable property, loses, not only all remedy, but his title by being out of possession for more than 12 years, was held to apply to the case of a recusant proprietor claiming malikana (8). So where there has been no enjoyment of it for a period of 12 years, the right to recover ceases (9); but this right will subsist by the recognition of the proprietor by depositing malikana (10). It has further been held that the claim for malikana

(1) I. L. R. 5 Calc. 921. (2) 9 W. R. 102. (3) 19 W. R. 94.

(4) 7 W. R. 336; 9 W. R. 102; 10 W. R. 302; 12 W. R. 498; 4 B. L. R. A. C. 29; I. L. R. 9 All 591; I. L. R. 5 Calc. 921; 22 W. R. 551.

(5) 12 W. R. 46; 3 B. L. R. App. 163. (6) 12 W. R. 498; 4 B. L. R. A. C. 29.

(7) I. L. R. 10 Calc. 708. (8) 13 W. R. 466. (9) 19 W. R. 94.

(10) 17 W. R. 135.

would not be barred even by 12 years, if the arrangements were that it would be paid not in cash, but by a set off against rent (1). But it has recently been held by Pratt and Bodilly J. in *Kullar Roy v. Ganga Pershad* (2) that a suit for malikana by some only of the co-proprietors is not a suit for payment of money charged on immovable property, but is a claim arising out of a *quasi* contract created by law and is, therefore, governed by three years' limitation and Art. 115 of the Limitation Act is applicable.

When co-proprietor
sues.

(To be continued.)

SARATENDU GUPTA.

(1) 21 W. R. 88

(2) 3 C. L. J. 768.

REVIEWS.

Indian Penal Code—by R. A. NELSON, M.A., LL.M.—FOURTH EDITION,—SRINIVASA VARADACHARI & Co., MADRAS, 1908. A commentary on such an important and abstruse Statute as the Indian Penal Code which has now reached a fourth edition, scarcely needs any commendation. Mr. Nelson's commentary, like his other works, is characterised by conciseness and clearness of exposition. In the present edition, the work has undergone a minute and detailed revision, and all recent cases of any importance numbering more than 600 have been duly analysed and noted. The result is, while the work still continues to be the best manual for law students, it is also useful to practitioners and administrators as a reliable guide to the latest exposition of the law on the subject. We desire to note, however, that exclusive reference to the Criminal Law Journal Reports is somewhat inconvenient; that series, as is well known, merely reprints the cases from the various official and non-official Reports, and invariably gives references to the original Reports which are copied out. It would be an advantage, if the references to the original Reports are added, otherwise the utility of the book is seriously impaired to all who possess the original Reports but not the Criminal Law Journal.

Legal Maxims (VOL. I, PART II)—by UPENDRA GOPAL MITRA, B.L. —We are glad to receive a second instalment of this useful and interesting work. The present part illustrates eight maxims, and we hope, it will be speedily followed by other parts.

CASES AND COMMENTS.

Defamatory words, meaning of—Defamation.

The plaintiff was employed as commercial traveller by the defendant, and the defendant signed and circulated among his customers cards in unfastened envelopes with these words upon them :—"H. Beswick is no longer in our employ. Please give him no order or pay him any money on our account." In an action of libel, the jury found that the words were libellous, and that the defendant acted maliciously in circulating them :

Held, that the words were not capable of a defamatory meaning, and the Court directed judgment to be entered for the defendant.

Beswick

v.

Smith.

[1907.]

Dec. 5.

 24 T. L. R.
169.

Cheque—Countermand of payment—Telegram.

A cheque drawn upon the defendant Bank was given by the plaintiff on October 31st to a third person. Upon the same day the plaintiff after banking hours, sent a telegram to the bank countermanding payment of the cheque. The bank being closed, the telegram was put into the bank letter-box. On the next morning, the bank cashier, when clearing the letter-box, by some accident left the telegram lying in the box, and it was not opened till the next morning, the 2nd November. In the meantime on the 1st November, the cheque was presented and was paid. In an action, by the plaintiff to recover the sum so paid away as money had and received :

Held, that the countermand of payment was not good until it was in fact brought to the knowledge of the bank, and that therefore, the plaintiff was not entitled to recover.

A telegram may reasonably, and in the ordinary course of business, be acted upon by a bank, at least to the extent of postponing the payment of a cheque until inquiry can be made ; but a bank is not bound as a matter of law to accept an unauthenticated telegram as sufficient authority for refusing to pay a cheque.

Curtice

v.

London City
and Midland
Bank.

[1907.]

Dec. 11.

 24 T. L. R.
176.

Glenie
v.
Tucker and
Bruce Smith.
[1907.]
Dec. 11.

24 T. L. R.
177.

*Bill of Exchange—Endorser guaranteeing debt—
Blank bill filled in.*

The plaintiff was in the habit of selling goods to the first defendant, and the second defendant agreed to be responsible for the price of the goods. The course of dealing was that in the case of each transaction, the first defendant should accept and the second defendant should endorse a blank bill form and hand it to the plaintiff, who was to fill it up as a bill of exchange. In the case of two bills sued upon, the plaintiff filled in his own name as drawer, and on one bill he signed his name as endorser above that of the second defendant, and on the other, he signed his name as endorser below that of the second defendant. The first defendant failed to pay, and the plaintiff sued the second defendant upon the bills :

Held, that as the second defendant agreed to be liable for the price of the goods supplied by the plaintiff to the first defendant, and endorsed the bills for that purpose, he was estopped from setting up that the plaintiff was a prior endorser ; and he was also estopped from setting up that at the time when he endorsed the bills, they were not complete and regular upon their face.

Spiers
v.

Hunt.
[1907.]
Dec. 2.

24 T. L. R.
183.

*Promise to marry on death of wife—Damages for
breach of promise—Contract—Public policy.*

A promise by a married man to a woman to marry her on the death of his wife, the woman knowing at the time that he is married, is in general against public policy and morals, and will not be enforced by the Courts.

SHORT NOTES.

Civil Procedure Code, Sec. 257A—Agreement in lieu of decree, not void.

Application by the Plaintiff.

The petitioner brought a suit in the Small Cause Court to recover a sum of Rs. 60 on the basis of an instalment bond and obtained a decree. The bond on which the present suit was brought in the Small Cause Court was executed by the defendants in favour of the plaintiffs, the petitioners, in lieu of the decree in the other suit. The agreement under which the bond was taken in lieu of the decree had not been made with the permission or sanction of the Court which passed that decree :

Held, (Brett and Geidt JJ.)—That the agreement, such as that on which the plaintiffs based their suit, was one which was not void under the provisions of section 257A of the Code of Civil Procedure.

I. J. R. 11 Calo. 671, I. L. R. 16 Calo. 504 and I. L. R. 20 Calo. 32 followed.

I. J. R. 22 Bom. 693 dissented from.

Babu Nares Chandra Sen Gupta for the Petitioners.

No one for Opposite Party.

Rule made absolute.

Decree, ex parte, setting aside—Attachment, processes of and sale proclamation issued at the same time—Limitation.

Application by the Decree-holder.

The application related to the setting aside of an order of the Munsiff. The order purported to set aside an *ex-parte* decree for rent passed against the opposite party who was the defendant in the suit. The sale of the property in arrears took place in 1905. It was confirmed and possession was taken by the decree-holders who were themselves the auction-purchasers. Subsequently there was a sale of another property of the judgment-debtor in execution for the balance of the decretal money. That sale was also confirmed, notwithstanding the opposition of the judgment-debtor on the ground that the processes had not been duly served. The order confirming the sale was dated the 18th February 1907. In the meantime, the opposite party applied for setting aside the *ex-parte* decree. The lower Court held that summonses had not been duly served upon the opposite party, and that there was no bar of limitation, inasmuch as the writ of attachment and the sale proclamation were served at one and the same time :

Held, (Mitra and Caspersz JJ.)—The mere fact that the processes of attachment and of sale proclamation were served at the same time would not be sufficient to take the case out of the Statute of Limitation.

Babu Umakali Mukerji and Joy Gopal Ghosh for the Petitioner.

Babu Krishna Prosad Sarbadhikary for the Opposite Party.

Rule made absolute.

1907.
November, 26.

Raj Kumar Poddar
v.
Elabakh Mahaldar.
Civil Rule No. 1871
of 1907.

1907,
November, 22.

Shib Chandra
Chowdhuri
v.
Janokiram Hasra
Civil Rule No. 2578
of 1907.

1907.
November, 29.

Koilas Chandra
Ghose.

v.

Haris Chandra
Ghose.

Civil Rule No. 2720
of 1907.

Civil Procedure Code, Sec. 629—Small Cause Court Judge—Review—Jurisdiction.

Application by the Defendant.

The opposite party had brought a suit against the petitioner to recover a certain sum of money due on a hand-note, and the Munsiff as a Small Cause Court Judge had dismissed the suit. Thereafter the opposite party applied for a review of judgment, but the application was refused. Afterwards the opposite party put in a second application for review on which the order was passed in respect of which the present rule was issued :

Held, (Brett J.)—That there was no provision of the law which prevented the Munsiff as Small Cause Court Judge from passing the order.

Per Holmwood J.—The Court has inherent power to give a hearing to any party who by no fault of his own, has had an *ex-parte* order passed against him.

Sec. 629 of the Civil Procedure Code does not apply to Courts of Small Causes.

The remarks in the case in I. L. B. 15 Calc. 432 are *obiter*.

Babu Bepin Behary Ghose for the Petitioner.

Babu Narendra Chandra Bose for the Opposite Party.

Rule discharged.

The Calcutta Law Journal.

VOL. VII. }

CALCUTTA, FEBRUARY 1, 1908.

}{ No. 3.

MALIKANA ALLOWANCE—(continued.)

Three years' limitation and Art. 115 of the Limitation Act is applicable.

As a natural consequence of malikana being an interest in land, when the question of the proprietary right has been decided in a previous suit between the same parties, a subsequent suit for malikana will be barred as *resjudicata* (1), as contradistinguished from the relation of a landlord and tenant (2). In a recent case, *Rahim Rai v. Ram Golam Lal* (3), Mr. Justice Mitra and Mr. Justice Holmwood also held that malikana is a right to obtain certain amount on account of the proprietorship of land.

Law of Resjudicata applies.

We have shown above that proprietors would not be entitled to malikana, if they continue to occupy their lands, and Regulation VII of 1822 (4) further enacts that if the proprietors be in receipt of any perquisite, or the profits of any lands in lieu of the *nankar* formerly granted to them by the native Governments, or otherwise, in consideration of their proprietary tenure, the amount of such allowance shall be deducted from the malikana to which they are declared to be entitled; yet the right to set off as regards malikana and *nankar* cannot be the incidents of the tenancies, and such a set off can be claimed only on a contract between the parties (5), of course a long course of dealing will be evidence of such a contract (5).

Malikana and Nankar.

Malikana a charge on estate.

In dealing with the question of limitation applicable to suits to recover malikana, it has been in several cases stated to be a charge on immovable property (6). But in the case of *Mussammat Ozeerun v. Baboo Heeranund Sahoo* (7), it was held that malikana is really a money payment, and is to be regarded like a bond or other debt, but is charged on the estate so that 12 years' limitation is applicable under clause 13, section 1, of Act

(1) I. L. R. 10 Calc. 697. (2) 13 W. R. 466. (3) 4 C. L. J. 14n.

(4) Regulation VII of 1822, Section V cl. 2.

(5) 4 C. L. J. 14n. (6) 6 W. R. 152; 7 W. R. 337; 9 W. R. 102; 10 W. R. 302; I. L. R. 5 Calc. 591

I. L. R. 59 All. 597-98.

(7) 7 W. R. 837.

XIV of 1859. In *Heeranund Sahoo v. Mussamut Oæerun* (1), Mr. Justice Bayley held that 12 years' limitation was applicable in malikana suits, as it was an interest in immovable property; and he did not go further than this; while his colleague Mr. Justice Phear observed that malikana is an interest in immovable property and is very much of the nature of rent-charge. Sir John Edge, C. J. in *Churaman v. Balli* (2), while trying to find out the significance of the word malikana in a mortgage bond, observed that malikana reserved on a settlement by a Government Settlement Officer for a zemindar, was an annual charge upon the property and the profits arising therefrom, while Sir Barnes Peacock, C. J. says it is a right to receive a portion of the profits of the estate (3). We have shown above that a suit for malikana by some only of the co-proprietors is not a suit for payment of money charged on immovable property (4); but in *Hurmuzi Begum v. Hirdaynarain* (5), where the plaintiff, the purchaser of a seven-anna share of the malikana rights in a certain mouza sued the defendants, the purchasers of the remaining nine-annas share of the malikana, to recover from them the malikana due on his seven-annas share (the malikana of the whole sixteen-annas having been collected by the defendants) it was held that the amount was recoverable within twelve years from the time when the money sued for became due, on the general principle that malikana is a sum charged upon immovable property.

Form the above decisions, it appears that the word charge has been used with respect to malikana in cases where the only point for decision was the period of limitation applicable to suits for recovery of malikana, and so it can be well said that the word was only a convertible term or that the word meant an interest in immovable property; particularly because the law of limitation made a special provision that for the purposes of limitation, malikana will be deemed to be money charged upon immovable property (6). And that this word cannot signify any thing other than that is clear when Mr. Justice Bayley observed that malikana is really a money payment (7), and this view is supported by what Mr. Justice Mookerjee held in the case of *Royzuddi*

Malikana is a
money debt.

(1) 9 W. R. 102.

(2) I. L. R. 9 All. 597.

(3) 12 W. B. 498; 4 B. L. R. A. C. 29.

(4) 3 C. L. J. 762.

(5) I. L. R. 5 Calc. 921.

(6) See Explanation to Art. 182 of the Indian Limitation Act, 1877.

(7) 7 W. B. 337.

Sheikh v. Kripartha Nath Mukerjee (1), relying upon the observation of Justice Day in *Burlinson v. Hall* (2), by a charge the title is not transferred, but the person creating the charge merely says that out of a particular fund, he will discharge a particular debt. Nor do we find in any of the Regulations creating the malikana, that the estate has been made security for the payment of the allowance ; this point has not yet been reported to have come up for decision in any of the High Courts of India.

Of course malikana cannot have the effect of a rent charge, as it has been held that malikana is not rent (3) ; specially because the consequence which follows from the provision that rent is a first charge for arrears of rent produces the effects described, in Chapter XIV of the Bengal Tenancy Act ; which is a special provision made for such rents and the charge referred to in that Act is not such a charge as is contemplated by the Transfer of Property Act (4), or any other law.

As to the registration of malikana interests under Act VII (B. C.) of 1876, the recipients of malikana are in possession of a proprietary interest and their interests should, strictly speaking, be recorded in Part I of the General Register A (5). But the so called "Malikana-dars" or recipients of malikana whose estates have been already permanently settled with others, or who have in any way lost all right of re-entry should not be admitted to registration in Register A, their proprietary rights being considered as lapsed (6). Similarly malikanadars who hold certain lands rent free, and do not receive a money allowance, should not be registered. If they have lost all right of re-entry, they only hold these lands as the lakherajdars of a tenure included in the estate, and no longer as proprietors. Their interests should be recorded, if at all, in Register B, Part I (6).

The payment of malikana due to proprietors during the currency of settlement, will be made only in one instalment for the whole year. A record of recipients and of payment of such malikana will be maintained in a Register kept specially for that purpose which

(1) 4 C. L. J. 224.

(2) 12 Q. B. D. 347 (350).

(3) 6 W. R. 152 ; 9 W. R. 102 ; 12 W. R. 498 ; 4 B. L. R. A. C. 29.

(4) C. L. J. 219 (227).

(5) *Vide* Board's No. 310A dated 2nd April 1877, to the Commissioner of Patna.

(6) *Vide* Board's No. 537A dated 16th June 1879, to the Commissioner of Patna.

will be in charge of a Deputy Collector. A Register of recipients of permanent malikana will be kept by each Collector in a prescribed form. The Register provides for the recording of mutations, whether due to sale, gift or inheritance. Permanent or pensionary malikana will be paid on permanent payable orders issued by the Collectors (1).

SARATENDRA GUPTA.

(1) *Vide* Board's Rules, Chapter IV.

(*Concluded.*)

REVIEWS.

The Transfer of Property Act by T. R. DESAI, B. A., LL. B.,—Lawyer Office, Girgaon, Bombay, 1908—Rs. 4.—The present volume is stated to be an enlarged edition of the author's Manual of Equity, so far as it relates to the Transfer of Property Act. The Act as is well-known is based mainly upon principles of English Law, and the condensed form in which the rules are stated has rendered necessary a large amount of judicial exposition. The law student who has to master this body of legal rules, finds a considerable difficulty. With the help of a commentary like the one before us, his labours ought to be comparatively easy. He will find here under each section a full note upon its scope as also an analysis of the leading cases on the topic. At the same time, there is enough material to make the volume useful to the practitioner. The Appendices which contain the High Court Rules and Forms of conveyancing will be found useful. We trust the work in its new form will meet with recognition from the profession as also from law students.

The Indian Evidence Act by T. V. SANJIVA ROW, TRICHINOPOLY, 1908.—This is the first part of what promises to be an admirable edition of the Indian Evidence Act. The Act which is of every day use to all members of the profession has been annotated times without number. Some of these commentaries are exhaustive treatises on the subject, but their very comprehensive character affects their usefulness as practical guides to the law on the subject. The present publication by Mr. Sanjiva Row is characterised by all the good qualities that mark his previous works. The analysis and arrangement are perfect. Under each section is grouped the whole of the Indian case law on the subject with appropriate headings, sub-headings and catch

words. In addition to this, we have references to a selection of English cases on the subject. We have very carefully tested portions of the notes, and it may be safely affirmed that the present edition will take its place as an indispensable volume to all members of the profession and administrators of the law.

Our New Judge.

The Hon'ble Mr. Justice Mookerjee who has been placed on deputation in connection with University work under the new Regulations, will, we regret to hear, be away from Court probably or several months. It has given us great pleasure, however, to find that Babu Lal Mohan Doss has been appointed to officiate as a Judge during the absence of Mr. Justice Mookerjee. The public are indebted to the Hon'ble the Chief Justice for so appropriate a selection. We take this opportunity to offer our heartiest congratulations to **Mr. Justice Doss** on his elevation to the Bench, which has come so fittingly to a gentleman of his position at the bar. His appointment has been received with widespread satisfaction by all branches of the profession and by the public generally. It may confidently be expected that his long professional experience and his deep erudition, added to his genial temper, will enable him to maintain the best traditions of the vakil Judges of this Court.

SHORT NOTES.

Administrator—Permission to borrow—Borrowing smaller amount—Benefit of the estate.

Appeal by the Administrator.

The Court granted the Administrator permission to mortgage the property for Rs. 5,100 and instead of doing that, he mortgaged it only for Rs. 4,000. The Judge repudiated the transaction and cancelled the permission, and required the Administrator to redeem the mortgage and directed that he must produce the bond before the Court within 15 days :

Held, (Maclean C. J. and Coxe J.)—That the Administrator raised the money and applied it properly. The Judge cannot repudiate the transaction. The estate is less burdened and the interest payable is smaller, and hence it was for the benefit of the estate.

Babu Samatul Chandra Dutt for Appellant.

Appeal allowed.

1908.
January, 8.
In re Abdul Hakim.
M. A. No. 215
of 1908.

1908.
January, 8.

Asad Ali
v.
Hyder Ali.

M. A. No. 264
of 1906.

Maintenance—Assignment—Application for execution.

Appeal by the Decree-holder.

Held, (Maclean C. J. and Coxe J.)—The assignment of certain monthly payments for maintenance, so far as it affected the arrears accrued due at the date of the assignment, is a valid assignment and the assignee is entitled to be substituted on the record in the place of the assignor, the decree-holder.

Babus Joges Chandra Roy and Monmotho Nath Mukerji for Appellant.

Babu Baranosibasi Mukerji (for Babu Hari Churn Sarkhel) for Respondent.

Appeal allowed.

1908.
January, 9.

Abdul Sabhan Kazi
v.
Katyani Dasi.

M. A. No. 222
of 1907.

Transfer of Property Act, section 87, Possession—Limitation Act.

Schedule II, Art. 179.

Appeal by the Judgment-debtor.

Held, (Maclean C. J. and Coxe J.)—Article 179, Schedule II of the Limitation Act applies to an application for execution of an order for possession passed in a mortgage-suit under section 87 of the Transfer of Property Act.

Babu Jodu Nath Kanjilal for Appellant.

No one for Respondent.

Appeal decreed.

1908,
January, 3, 13.

Abdus Subhan
v.
Kurban Ali.

S. A. No. 201 & 318
of 1906.

Mahomedan Law, worship, right of—Ritual, views different in the matter of—Injunction.

Appeal by Defendants.

Held, (Brett and Chitty, JJ.)—The plaintiffs who are Mahomedans belonging to the Wahabi sect, have the right to worship in mosques built by Mahomedans of the Hanafi sect primarily for the use of the members of their own sect, and that they could not be debarred from the exercise of such right on the ground of their difference in the matter of ritual, provided the plaintiffs in the exercise of their rights of worship do not interrupt or disturb the worship of others.

I. L. R. 7 All. 461 and I. L. R. 18 Cal. 448 referred to.

The dictum of Edge, C. J. in I. L. R. 12 All. 494 followed.

Moulvies Syed Shamsul Huda and Muhammad Ishfaq for Appellants.

Moulvies Mahomed Yusuf, Abdul Jawad and Babu Biraj Mohan Mojumdar for Respondents.

Appeal dismissed; decree varied.

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CALCUTTA, FEBRUARY 16, 1908.

} No. 4.

Intermediate tenure between Putni and Dur-putni—Rent, assignee of—Suit, maintainability of.

Appeal by the Defendant.

Held, (Mitra and Caspersz JJ.)—There is nothing in the policy of the law or custom of the country to prevent the creation of an intermediate tenure between a *putnidar* and a *dur-putnidar*. It is immaterial what name is given to it.

The plaintiff sued in the character of an intermediate tenure-holder and he was merely an assignee of rent.

Held further, that a suit lay at his instance to recover rent from the *durputnidar*.

Babu Priya Sankar Mojumdar for Appellant.

Babu Debendra Nath Bagehi for Respondent.

Appeal dismissed.

Partition, suit for—Persons holding interests of inferior degree—Party, necessary—Putnidar—Dur-putnidar.

Appeal by the Defendant No. 1.

Held, (Mitra and Caspersz JJ.)—In a suit for partition, persons holding interests of an inferior degree are not necessary parties. A person holding a permanent interest, though an interest of an inferior grade, may bring a suit for partition, as against persons who hold interests of a superior grade, so that if a *putnidar* who has a *durputnidar* under him declines to bring a suit for partition against the co-*putnidars*, the *dur-putnidar*, as representing the interest of such *putnidar* may bring a suit for partition against the co-*putnidars* of his own *putnidar*.

I. L. R. 24 Calc. 583, 1 C. L. J. 40 and 5 C. L. J. 643 referred to.

Similarly a *putnidar* may bring a suit for partition against his co-*putnidars* and he may also bring a suit for partition against *dur-putnidars* under his co-*putnidars*. But in the latter case, the co-*putnidars* must be made parties.

It cannot be laid down as a broad rule of law, that in each case, a *dur-putnidar* is a necessary party-defendant in a suit for partition, if his *putnidar* is made a party and if such *putnidar* does not wish to avoid the responsibility which attaches to a party in a partition suit, that is to say that the partition is carried out in a fair and equitable manner.

Babus Dwarka Nath Chuckerbutty and Akshoy Kumar Banerjee, for Appellant.

Babu Harendra Narayan Mitter and Moulvi Z. R. Zahid (for Moulvi Syed Shamsul Huda) and *Babus Dhirendra Lal Kastgir and Girija Prosanna Roy Chowdhury* for Respondent.

Appeal dismissed.

Transfer of Property Act (IV of 1882), Sec. 111 (g)—Lease of immoveable property—Renunciation—Onus of proof.

Appeal by the Plaintiffs.

Held, (Maclean C. J. and Coxe J.)—Section 111, cl. (g) of the Transfer of Property Act deals with the whole lease of the immoveable property comprised therein and not with a part or moiety of it. It does not apply to the case where not all but some of the lessees renounce their character as such.

1908.
January, 14

Madhu Sudan Saha
Chowdhury.

v.
Debendra Nath
Sarkar.

M. A. No. 90 of
1907.

1908.
January, 7, 8, 21

Upendra Chandra
Singha Roy.

v.
Mahammad Fais
Chowdhury.

R. A. No. 268 of
1906.

1908.
January, 21.

Farman Bibi

v.
Tasha Haddal
Hossain.

S. A. No. 44 of
1906.

It is upon the lessor to make out that the lessee has renounced his character as such by setting up a title in a third person or by claiming title in himself.

Babu Harendra Narayan Mitter for Appellant.

Dr. Rash Behary Ghose and Moulvi Mahammad Mustafa Khan for the Respondent.

Appeal dismissed.

1908.
January, 23.

Nadia Sundari Debi
v.
Girindra Narayan Singha.

S. A. No. 781 of
1906.

Rent—Payment by monthly instalment—Purchaser, liability of—Interest.
Appeal by the Defendant.

The original kabuliati was executed in 1865 and contained the stipulation that the rents should be paid by monthly instalments. The tenure was sold in execution of a rent decree :

Held, (Stephen and Doss JJ.)—That the purchaser is bound to pay rent by monthly instalments and interest on arrears will be calculated monthly.

Marshal 252 distinguished.

I. L. R. 30 Calc. 213 and 9 C. W. N. 175 referred to.

Babu Shyama Prasanna Mozumder for Appellant.

Babus Shib Chunder Palit and Satyendra Nath Mukerji for Respondent.

Appeal dismissed.

1908.
January, 23,

Priya Nath Mandal
v.
Mahesh Chandra Dandapat,

S. A. No. 682 of
1906.

Bengal Drainage Act (VI of 1880 B. C.), Secs. 31, 38—Sale for drainage charges—Sale under Sec. 19 of Public Demands Recovery Act (I of 1907 B. C.), what passes.

Appeal by Defendant No. 1.

The plaintiff claimed to recover possession of *debutter* land on the allegation that the *shebaitis* in order to meet certain charges under the Drainage Act granted a *mourasi mokarari* potta of the disputed land on the 4th April 1900. The shebaitis, however, could not meet the drainage charges and accordingly the land was sold under the provisions of the Public Demands Recovery Act and purchased by the contending defendant on the 3rd June, 1901. The certificate under which the defendant purchased was of 1900-1, and consequently, the drainage charges were becoming due at the time of the plaintiff's potta.

Held, (Maclean C. J. and Coxe J.)—That the land subject to the previously granted potta passed by the sale under the Public Demands Recovery Act.

Babus Mahendra Nath Roy and Krishna Prosad Sarbadhikary for Appellant.

Babu Akhoy Kumar Banerji for Respondent.

Appeal dismissed.

CONSTITUTION OF THE BENCHES.

From 17th February 1908.

Maclean, C.J. & Doss, J.—Privy Council Department and Presidency Group.

Rampini & Sharfuddin JJ.—Burdwan Group.

Brett & Coxe, JJ.—Patna Group.

Stephen & Holmwood, JJ.—Rajshahye Group.

Woodroffe and Geldt, JJ.—Criminal Business.

Mitra J.—Second appeals up to the value of Rs. 1,000.

Harington, J.—Criminal Sessions.

Chitty & Fletcher, JJ.—Original Side.

The Calcutta Law Journal.

VOL. VII. }

CALCUTTA, MARCH 1, 1908.

} No. 5.

The Hon'ble Mr. Justice H. L. Stephen.

We have great pleasure in presenting our readers with a portrait of the Hon'ble Mr. Justice Stephen.

Harry Lushington, third son of Sir James Fitz James Stephen who worked his way to the Bench of the High Court of Justice of England by sheer merit, by force of his intellectual powers, the profundity and precision of thought which he had shown in dealing with Indian Law, and in books upon English Law, treating of subjects which since his books appeared, no wise man has so much as attempted to handle—was born on March 2, 1860. He was educated at Rugby and at Trinity College, Cambridge passing out in the second class of the Law Tripos in 1881. He took his LL.B. in 1882.

Mr. Stephen was called to the Bar by the Inner Temple in 1885 and the next year, he joined the South Wales Circuit. In 1887, he began to practise locally at Cardiff, where he acted for a period as Clerk of the Peace for the County of Glamorgan. He was appointed a revising barrister in 1888 and in 1891 he removed to London.

Before coming to the Calcutta High Court, Mr. Justice Stephen had some judicial experience, having in 1897 acted for sometime as a Judge in the Gambia. He was a member of Bar Council from its institution till 1901, when he was appointed by His Majesty to succeed Mr. Justice (now Sir John) Stanley as a Judge of the High Court of Bengal.

Mr. Justice Stephen is a versatile writer, his subjects ranging from *English Grammar* (Cobbett), and *Support and Subsidence* (Butterworth, 1890) to an eminently readable and handy edition in four volumes of *State Trials, Social and Political* (Duckworth 1899, 1902). He has also edited Oke's *Magisterial Synopsis*, Oke's *Formulist* and his father's *Digest of the Criminal Law and the Law of Evidence*.

It is not yet time to make any pronouncement upon his Lordship's career as a Judge, but we may be permitted to observe that by his sound common sense and unfailing courtesy to practi-

tioners appearing before him, his Lordship has endeared himself to all branches of the profession. Mr. Justice Stephen was married in 1904 to Barbara, daughter of the late W. S. Nightingale of Embley, Romsey, Hants and Lea Hurst, Derbyshire, by whom a son was born to him on the 25th February, 1908.

THE EARLY HISTORY OF INSURANCE LAW.*

It seems so highly improbable that the practice of insurance, now deemed indispensable to the safe conduct of commerce on sea or land, should have been unknown to the Phœnicians, Rhodians, Romans and other ancient commercial peoples, that scholars have subjected ancient writings to the closest scrutiny in the effort to find in them some evidence that insurances were made in early times. The result has been the discovery of accounts of certain transactions which bear such a resemblance to insurance as to have led not a few scholars to the conclusion that insurances were known to the ancients, although the business of underwriting commercial risks was probably not highly developed. Foremost among these writers championing the ancient origin of insurance is Emerigon, whose brilliant and learned *Traite des Assurances*, first published in 1783, is still read with respect and admiration by all students of the subject, and cited as authority in the courts of all civilized countries. In this country the same view has been advocated by Justice Duer, whose discriminating and scholarly Lectures on Marine Insurance were published in 1845, and there are not wanting recent text-writers to reach the same conclusion. The contention that insurance was known to the ancients rests mainly upon certain passages found in the histories of Livy and Suetonius and in the letters of Cicero. Livy tells us that the contractors who undertook to transport provisions and military stores to the troops in Spain stipulated that the government should assume all risk of loss by reason of perils of the sea or capture. In the second passage from Livy, which gives in detail an account of the extensive frauds practised by one Postumius upon the country during the Second Punic War by falsely alleging that his vessels, engaged in the public service, had been wrecked, or by making false returns of the lading of old hulks that were purposely wrecked, it seems to be taken as a matter of course that the government was liable to make good such losses.

* Reprinted from the Columbia Law Review, Vol. VIII, No. 1 (January, 1908) omitting the foot notes.

Suetonius, in his life of Claudius, states that that emperor, in order to encourage the importation of corn, assumed the risk of loss that might befall the corn merchants through perils of the sea. This passage alone was sufficient to convince Malynes that Claudius "did bring in this most laudible custom of assurances."

Likewise many writers have thought that Cicero refers to a transaction of commercial insurance when he writes to Caninius Sallust, proquæstor, that in his opinion sureties should be procured for any public moneys sent from Loadicea, in order that both he and the government should be protected from the risks of transportation. These passages of doubtful significance when read in connection with the well-known fact that the rules of general average, and bottomry and respondentia loans, transactions closely related to insurance, were familiar to the ancients, have been considered by these writers adequate evidence that insurance was at least known to the commercial peoples of the ancient world.

On the other hand, a great number of writers on insurance consider that these passages refer to other transactions than insurance, and conclude that insurance was wholly unknown among the ancients. Among these are Grotius and Bynkershock on the continent, and Park, Marshall and Hopkins in England.

This conflict of opinion as to the practice of insurance among the ancients is due largely to the fact that some writers restrict the significance of the term "insurance" more narrowly than others. The fact that we find no trace of the insurance contract in the laws of Rome or of any of the other ancient peoples, indicates unquestionably that if the contract of insurance, as known in modern times, was known to the ancients at all, its practical use was so little developed as to have made it insignificant. But if the term "insurance" be given a broader significance and made to include any kind of conventional arrangement by which one or more persons assume the risk of perils to which others are exposed—that is, an arrangement for aiding the unfortunate—then it is equally unquestionable that insurance is as old as human society itself. Friendly societies organized for the purpose, among others, of extending aid to their unfortunate members from a fund made up of contributions from all, are as old as recorded history. They undoubtedly existed in China and India in the earliest times. Among the Greeks these societies, known as *Eranoi* and *Thiasoi*, are known to have existed as early as the third century before Christ. These Grecian societies were largely religious and ritualistic, but among their chief functions, we learn, was that of providing for the

expense of fitting burial for members. Similar societies, called *Collegia*, existed in Rome, where their establishment was attributed to Numa. These also performed many of the functions of benefit insurance societies, providing succour for the sick and aged members ; and burial for those deceased. These Roman *Collegia* fell into disfavour under the emperors, but nevertheless continued to exist, with restricted functions and influence, up to the time of the fall of the Empire, and it is probable that their existence was continued in spite of the disorder due to the numerous invasions of Italy until they reappeared in history as the mediæval guilds. Of this, however, there is no documentary proof. It is certain that the guilds, which throughout Europe became so numerous and influential from the eleventh to the eighteenth centuries, possessed very many of the characteristics of the modern mutual benefit association, and, as such, carried on a primitive kind of insurance against the misfortunes incident to sickness and old age.

In England, these guilds existed among the Saxons before the conquest. We learn that among the purposes of these saxon guilds was to provide for any member who had had occasion to take the life of any one, the *wergeld*, or indemnity that, under the saxon law, was payable to the family of the person slain. It seems that these guilds, in addition to providing, by contribution of the members, aid for the sick and burial of the dead among their number, also furnished indemnity to those who had suffered loss by fire. After the conquest, the English guilds became numerous and influential. Of one of these, the guild of St. Katherine, Aldersgate, we learn that the brethren assisted any member if he "falle in poverté, or be aneantisid thorw elde or thorw fyr oder water, theves or syknessee." Thus we perceive that what are now termed sick benefit insurance and burial insurance have existed from time immemorial, and that, while many of the benevolences of these fraternal associations were charitable merely, yet there is to be found in their history distinct evidence of contractual insurance, and even of mutual fire insurance.

In like manner there may be included under the broad definition of insurance given above agreements made by Governments, whether through the medium of enactments or through private contract, in accordance with which indemnity is provided for those who suffer loss from peculiar perils. Such just and proper provisions for the protection of the citizen rendering service to the Government are doubtless of great antiquity. As stated above, Livy speaks of the practice whereby the Roman Republic

indemnified those engaged in transporting military supplies for losses suffered by perils of the sea or acts of the enemy, as one long established and unquestioned. This undoubtedly was insurance in a limited sense. Indeed, we have evidence that a sort of Government insurance was practiced in times much earlier than those of which Livy wrote. In the Code of Hammurabi, which must have been enacted at least as early as 2250 B. C., we find a provision that a city in which any man should be robbed of his property should be under obligation to indemnify him for his loss while if the city and governor permitted such disorder that a person lost his life, the family of the murdered man were entitled to be indemnified from the public treasury.

Furthermore, bottomry and respondentia bonds and the allowing of general average in case of shipwreck and the jettison of the goods of one or more of the joint adventurers, may well be included under the term insurance in its broadest significance, and these were unquestionably known and much used among the ancients, particularly among the Rhodians. The lender of money in bottomry who could claim the repayment of his loan only if the vessel upon whose bottom the loan was made completed the contemplated voyage in safety, was entitled, not merely to the current rate of interest on the money loaned, but also to an added sum which would compensate him for the risk he ran of losing his whole principal, and which in reality, represented the premium paid upon the risk assumed. We, therefore, conclude that the principle of insurance, considered as an arrangement whereby a person subjected to any peril may be indemnified for loss on account of such peril, was known to the ancients and made use of by them to a very considerable extent; but that commercial insurance, as practiced so extensively in modern times, was either unknown to them or little used.

We are, therefore, safe in concluding that the use of insurance as an important element of commerce and social economy, has had its origin in relatively recent times, but we cannot with any accuracy fix the date of its beginning nor determine indisputably what city or country is entitled to the credit of having originated it. Some scholars have professed to discover evidence that commercial insurance was first developed in Portugal, while some others favour Spain and Flanders. More recent research, however, made among the ancient records of the Chamber of Commerce of Florence has established satisfactorily that insurance had its origin in the great commercial cities of Northern Italy, where it must have been in common use among the merchants engaged in carrying on the large foreign

trade of those cities as early as the beginning of the fourteenth century, and possibly more than a century earlier. Among the records of the Florentine Chamber of Commerce are the books of Francesco del Bene and Company, of Florence, which set forth commercial transactions dating from A.D. 1318. In these books are recorded the items of expense incident to trade in Flemish cloth and other articles. Among these items one frequently finds the cost of insuring the goods in transit. From the character of the references to insurances thus made, we can readily infer that as early as 1318 the custom of making insurances upon goods subject to peril of transportation either on sea or land had become a customary incident of traffic. This fact justifies the conclusion that among these Italian cities insurance had been in use many years before the date of the entry in these old Florentine books. The earliest policy of insurance now extant was made in Genoa in the year 1347. This quaint old document which, it will be observed, was in the form of a promise to repay a fictitious loan upon the happening of any misfortune to the vessel insured, is set forth in all of its barbarous Latin. The first certain record of an insurance transaction at Bruges is of the year 1370, but the policy in question was evidently issued by a Genoese underwriter. The earlier trustworthy evidence of the practice of insurance at Barcelona is found in certain ordinances of the City of Barcelona published in 1435, which contain extensive provisions for the regulation of marine insurance. The particularity of these regulations shows clearly that the practice of insurance had already become extensive and of much importance in the commercial life of the Catalonion City some time before the date mentioned, but it is hardly probable that it antedated the similar practice in the Italian cities, which, as we have seen, certainly existed considerably more than a century earlier than the date of the Barcelona ordinances. Another positive reason for thinking that insurance was of later development in Barcelona than in the Italian cities is found in the earliest extant edition of the *Consolat de Mar*, known to have been published at Barcelona in 1494. This celebrated collection of sea laws, which under its Italian name of *Consolato del Mare*, had for three centuries such wide currency throughout Europe, and which is generally believed to have been first published in Barcelona as early as the middle of the thirteenth century, contains no reference whatever to insurance.

(To be continued.)

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CALCUTTA, MARCH 16, 1908.

} No. 6.

THE EARLY HISTORY OF INSURANCE LAW.

It has been generally believed that the contract of insurance was first used in underwriting marine risks, and it is indisputable that it had its earliest and most important development in connection with maritime interests. Nevertheless, it is interesting to observe from these ancient books of Francesco del Bene and Company, the Florentine merchants already referred to, that as early as 1318 insurances were customarily made against loss by reason of dangers incident to land transportation, as well as to that by sea, and that shipments of specie were also at that early day insured just as in modern times.

The daring and adventurous merchants of the Italian cities carried on extensive commerce with all of civilized Europe, and during the fourteenth and fifteenth centuries their practice of insuring their ventures spread with their trade to every considerable trading town of the Continent and of England. The usages of insurance, therefore, readily took on the same international character that had already been impressed upon the other customs of traders engaged in international mercantile pursuits. The usages governing the older forms of commerce, especially maritime usages, had found expression in collections of regulations and ordinances of great antiquity, that came to possess the greatest authority throughout Europe rather by their general acceptance than by force of authoritative enactment. These "Sea Laws," as they were known, had their origin much earlier than the beginning of the practice of insuring ventures at sea, for otherwise they would not have been silent on so important an adjunct to successful commerce. But their existence undoubtedly greatly facilitated the rapid growth of a body of international insurance customs, which soon became incorporated with the greater body of commercial usages and became an integral part of the law merchant, having the same sanctions and enforced through the same procedure before conventional merchant courts.

As early as 1411 the business of making contracts of insurance had become of sufficient importance among the Venetians to attract legislative action, for on May 15th of that year we find

that an ordinance was passed condemning and prohibiting the prevalent practice among Venetian brokers of underwriting foreign risks. But it is evident that underwriters did not at that early day regard insurance regulations with any greater respect than do their successors of the present time, for in June, 1424, another ordinance again prohibited insurances upon foreign vessels or goods, the preamble carefully explaining that an added reason for not underwriting such risks lay in the fact that war was raging between the Genoese and the Florentines and Catalonians, on which account the Venetians should refrain from aiding any of the belligerents. After this insurance became a favorite subject for regulation, often of a very drastic character. From the texts of these ordinances it is evident that in Venice the business of underwriting early became localized, just as in London it was carried on in Lombard Street, for in these Venetian ordinances it was usually provided that they should be read at noon on the "Street of Insurances at the Rialto."

In 1435 insurance ordinances, still extant, were published at Barcelona. As already stated, the edition of the *Consolat de Mar* published at Barcelona in 1494 contained no reference to insurance, nor did the Laws of Wisby or of the Hanse Towns, which, though of earlier origin, were published probably about this same time. It seems that these laws of the northern commercial cities were little more than adaptations of the much earlier laws of Oleron, which likewise make no mention of insurance. In 1647, there was published at Bordeaux Cleirac's *Us et Coustumes de la Mer*, which contained the text of the *Guidon de la Mer*. This famous treatise on sea laws, which was compiled by some unknown author of Rouen between the years 1556-1600, treated extensively of marine insurance. In 1681, the Marine Ordinances of Louis XIV were published. These ordinances, supposed to be largely the work of Colbert, Louis XIV's gifted Minister of Finance, provide for the regulation of the business of insurance with a completeness of detail that speaks clearly both of the importance of commercial insurance at that time and of the age and extent of the practice that could make such detail possible. Additional evidence of the important place assumed by insurance during the sixteenth century is found in the publication of treatises on insurance by Santerna in 1552 and by Straccha in 1569. The excellent treatise of Roccus, an eminent jurist of Naples, was not published until 1655 much later than the first English treatise by Gerard Malynes, which first appeared in 1622.

The introduction of the practice of insurance into England is shrouded in the same obscurity that envelops its origin on the

Continent. Gerard Malynes, in his quaint treatise on the law merchant, published in 1622, asserts that policies of insurance were written in England at an earlier date than in the low countries, and that in fact Antwerp, then in the meridian of its glory, learned the practice of insurance from London. This conclusion he reached through the wording of the policies issued at Antwerp, which "do make mention that it shall be in all things concerning the said assurances as was accustomed to be done in Lombard Street, in London." Malynes' reasoning is far from convincing, and his conclusion is probably incorrect. It is highly probable, however, that the enterprising Lombards who had taken up their residence in London, in many cases as representatives of Italian trading houses, did not long delay in bringing to England the device of having their commercial ventures assured by underwriters which had proved so advantageous to the trade of their Italian associates. The activity of these London Lombards was so great as to give a name to Lombard Street, where they dwelt and carried on business as pawn-brokers, goldsmiths and importers of foreign goods. That the introduction of insurance into England is to be attributed to Italians there resident is not only highly probable in itself, but is also supported by much circumstantial evidence. Thus one of the clauses of the modern Lloyds' policy provides that the policy "shall be of as much force and effect as the surest writing or policy of assurance heretofore made in Lombard Street." We know also that the earliest policies issued in London of which we have any certain knowledge were written in Italian with English translations attached.

The first certain record of an insurance transaction in England is found in the report of the case of *Emerson c. De Sallanova*, determined in a Court of Admiralty in 1545. Curiously enough the insurance involved in this proceeding was not against the perils of the sea, as might have been expected, but against possible loss consequent upon the withdrawal by the King of France of a *safe* conduct. The oldest English policy extant, dated September 20th, 1547, is set forth in both Italian and English in the report of *Broke c. Maynard*, an admiralty cause. The copy of this policy is much mutilated, but a somewhat similar policy involved in *Cavalchant c. Maynard*, bearing date only a year later, is found in good condition among the records of the proceedings in admiralty. The English version of this venerable instrument is given in the note below (1).

(1) See *Columbia Law Review*, Vol. VIII, p. 12, foot note.

(To be continued.)

REVIEW.

Institutes of Mussalman Law—by NAWAB A. F. M. ABDUR RAHMAN, THACKER SPINK & CO., CALCUTTA, 1907, Rs. 16.—

Nawab Abdur Rahman has sprung into fame by this, his first attempt at authorship, for the work which he has produced is of abiding value and interest. The task of the British Administrators of this country in the way of enforcement of indigenous laws, has been of incalculable difficulty ; both Hindu Law and Mahomedan Law have suffered, but by a curious accident, the latter has fared worse than the former. The authoritative legal works of each system are written in language of considerable complexity, but while the more important works of Hindu Law have been translated into English, the fundamental works of Mahomedan Law are still sealed books. Nawab Abdur Rahman is, therefore, to be congratulated on the production of a work which takes us to the sources of the Mahomedan Law. He has cast his work into the form of a Code, the obvious advantages of which are precision and lucidity. Each Article is followed by references to the sources, which are analysed and reproduced in the Appendix. The result, therefore, is that we have the proposition of law clearly stated in English, and the original texts which support that proposition are collected and placed before the reader. The immense labour which this process must have cost the author, can be imagined, if we remember the condition in which the original Arabic books exist ; they are, as we all know, without any critical apparatus, such as is familiar to European scholars, by the aid of which a particular passage can be traced out. When we add to this vast mass of material, laboriously selected and judiciously arranged, the Digest of Anglo-Indian Case Law which follows each Article, it will be seen that nothing has been left out, which could by any possibility, be of any assistance to the student or to the practitioner. The elaborate Table of Contents of cases cited and of original authorities consulted leave nothing to be desired, while the exhaustive Index makes the Contents available to all who may find occasion to refer to the work. The general get up of the book is excellent and worthy of the reputation of the Publishers. We have nothing but praise for all concerned with the production of the work, which, we trust, will be speedily completed in the same style and be also followed by a smaller edition for the use of the students and junior practitioners.

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{ NO. 7.

THE EARLY HISTORY OF INSURANCE LAW.

It is evident that prior to the time of Lord Mansfield's accession to the Bench, the development of insurance law in England followed the same lines as that of the other branches of the law merchant. It was generally understood that the Common law Courts, which did not recognize the quasi-international customs of merchants, afforded no fit forum for the determination of causes between merchants. Hence all early insurance disputes must have been settled by conventional merchant Courts or arbitrators, who it seems, might be appointed, upon petition, by the Privy Council, the Lord Mayor of London, or by the Court of Admiralty. Thus, in the record of the proceedings before Admiralty prior to 1570, we find a petition by the owner of insured goods asking that arbitrators be appointed, and the underwriters made to pay, "and forasmuche as youe said rater hath noe remedye by the ordre and course of the common lawes of the realme, and that the ordre of insurance is not grounded upon the lawes of the realme, but rather a civil and maritime cause to be determined and decided by civilians, or else in the Highe Courte of Admiraltye."

There were evidently numerous disputes about the payment of insurances, and there were probably many cases in which the underwriters refused to perform the judgments of the merchant Courts, whose great weakness lay in the lack of a sheriff, for in the admiralty records for the year 1570 is found a petition on behalf of certain foreign merchants who complained that they could not get their insurance paid. In the same year there was an application by an "Easterling" for the appointment of arbitrators "forasmuche as the matter consistethe muche upon the ordre and usage of merchantes by whom rather than by course of law yt may be forwarded and determyned." It is noteworthy that when the Court of Admiralty made the reference, the commission to hear the case ran to certain English and foreign merchants.

The extracts just given from the admiralty records show that the inability of the conventional merchant Courts to enforce

their judgments compelled the merchants and underwriters to seek more formal and efficient tribunals before which to bring their causes. They first turned to the Courts of admiralty, which easily assumed jurisdiction of maritime and foreign contracts of insurance, and readily took cognizance of the customs of merchants. But for some reason, not easily understood, the Courts of admiralty did not prove satisfactory tribunals for the determination of insurance causes, and relatively few of such causes were brought before them. Lord Coke's misleading report of *Crane v. Bell* (1), a case decided in 1546, has been the source of several mistaken statements that the writ of prohibition granted in that case by a Common law Court took away from the admiralty Courts all jurisdiction of insurance questions. As a matter of fact, however, *Crane v. Bell* (1) had nothing to do with insurance, and we know that admiralty Courts still heard insurance cases for nearly half a century after the date of that case.

Whatever may have been the cause, it is clear that the admiralty Judges contributed little to the development of insurance law, and that during the latter part of the sixteenth century litigants sometimes felt compelled to carry insurance causes to the Common law Courts, in some cases even after they had been heard and determined by merchant Courts. Lord Coke's report of *Dowdales Case* (2), refers to an action brought in a Common law Court on an insurance policy in 1588. But manifestly the Common law Courts of that day, with their highly technical and tedious rules of procedure, as governed by precedents of agricultural rather than mercantile origin, were ill adapted for the settlement of merchants' disputes. Thus it appears that at the beginning of the seventeenth century persons having insurance causes were without a satisfactory tribunal for their determination. The conventional Courts could not enforce their judgments, the Courts of admiralty had proved inadequate possibly because of the vexatious jealousy of the Common law Courts in unreasonably restricting their jurisdiction, while the common law Courts were wholly unfit. The merchants and underwriters naturally sought relief from Parliament, and secured in 1601, the first English Insurance Act, "for the obtaining whereof," wrote Malynes, "I have sundry times attended the Committees of the said Parliament, by whose means the same was enacted not without some difficulty; because there was [sic] many suits in law by action of assumpsit before that time upon

(1) 4 Coke Inst., 139,

(2) 6 Coke's Rep. 46b.

matters determined by the Commissioners for Assurances, who for want of power and authority could not compel contentious persons to perform their ordinances ; and the party dying, the assumpsit was accounted void in law." The preamble of this Act is exceedingly interesting, since it not only shows the great importance of the business of insurance at the time of its enactment, and a remarkably clear understanding of the real nature of insurance, but it also gives in striking summary the history of insurance law and practice during the preceding century, which necessitated the establishment of the Court created by the Act. This preamble, in part, is as follows :

" (2) And whereas it hath been time out of mind an usage amongst merchants, both of this realm and of foreign nations, when they make any great adventure, (especially into remote parts) to give some consideration of money to other persons (which commonly are in no small number) to have from them assurance made of their goods, merchandizes, ships and things adventured, or some part thereof at such rates and in such sort as the parties assurers and the parties assured can agree, which course of dealing is commonly termed a policy of assurance ; (3) by means of which policies of assurance it cometh to pass upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few and rather upon them that adventure not than those that do adventure, whereby all merchants especially of the younger sort, are allured to venture more willingly and more freely : (4) and whereas heretofore such assurers have used to stand so justly and precisely upon their credits, as few or no controversies have arisen thereupon, and if any have grown, the same have from time to time been ended and ordered by certain grave and discreet merchants appointed by the Lord Mayor of the city of London, as men by reason of their experience fittest to understand, and speedily to decide those causes, until of late years that divers persons have withdrawn themselves from that arbitrary course, and have sought to draw the parties assured to seek their monies of every several assurer, by suits commenced in Her Majesty's Courts, to their great charges and delays."

By the provisions of this Act authority was given to the Lord Chancellor or to the Lord Keeper of the Great Seal, to issue commissions directed to "the Judge of the admiralty for the time being, the Recorder of London for the time being, two Doctors of the Civil law, and to Common lawyers, and eight grave and

discreet merchants, or any five of them," with authority to hear and determine in a summary manner insurance causes. This Court of Insurance Commissioners did not, however prove successful, owing to the fact that its jurisdiction was confined to causes arising on policies issued in London, and construed not to extend to any other insurances than those on goods. The Court was also held to be open only to the insured and not to the underwriter, and its judgments could not be pleaded in bar to a subsequent action at law. We are not surprised, therefore to learn that this special Court, lapsed into disuse, and died of inanition within a century after its creation.

The failure of this special Court seems to have discouraged any further attempts to better an almost intolerable situation, for the hundred and fifty years intervening between the enactment of 43 Eliz., and the appointment of Mansfield as Chief Justice of the Court of King's Bench are almost a barren waste as far as the history of the development of insurance law is concerned. The Common law Judges did not grow in wisdom or in the favour of those having insurance causes. The merchants and under-writers continued to submit their disputes to arbitrators and commissions, sedulously avoiding the Common law Courts. It is said that, all told, the reported insurance cases determined at law prior to Lord Mansfield's time did not exceed sixty in number, nor among these can there be found one that clearly establishes a great principle or that can be fairly considered a leading case. So slight was the grasp of the Common law Judges of this period upon the nature and true function of the contract of insurance that as late as 1746, it was uncertain whether an insurable interest was necessary to support a policy, although the fundamental principle requiring the presence of such an interest was perfectly well understood by the Continental authorities of an earlier time. In 1746, by Statute 19, Geo. II, c. 37, the making of policies without interest was prohibited, as was also the making of reinsurances, under the mistaken impression that they fell under condemnation as wager policies. During this period the doctrine of concealment was applied by the Court of King's Bench in *Seaman v. Fonereau* (1), and the peculiar doctrine of warranties in insurance policies was foreshadowed, rather than definitely declared, in *Jeffery v. Legender* (2), and in *Lethulier's Case* (3). Add to these a few somewhat uncertain cases on the effect of deviation, and we

(1) (1743) 2 Strange 1183.

(2) (1691) 3 Lev. 320.

(3) (1692) 2 Salk, 243.

have practically the sum of the contributions made to insurance law by Common law Judges prior to Mansfield.

Lord Mansfield became Chief Justice of the Court of King's Bench in 1756, which may rightly be considered as the date of the beginning of the development of the modern law of insurance as a part of the Common law system. This great Judge, thanks to his more liberal Scottish training, was not so slavishly attached to Common law precedents as to be unable to perceive the necessity of recognizing merchants' customs in determining rights under merchants' contracts, so bigoted as to be unwilling to seek light from foreign sources. In insurance causes, as with causes involving other branches of the law merchant, he impanelled juries of merchants and underwriters, to establish customs and usages current among those who made insurances, and diligently consulted the time-honored maritime laws of the Continent, and the treatises of English and Continental writers. Thus he not only gave prompt justice to litigants who appeared before him, and provided a fit tribunal for merchants, but he saw so clearly the fundamentals of the theory of insurance, and understood so well its practical applications to the needs of business and commerce, that the numerous doctrines that he laid down have survived all of the many changes in commercial conditions and methods that have since taken place, and almost without exception they apply as well to the commercial transactions of to-day as to those of Mansfield's own time. When he retired from the Bench in 1788, he left a complete system of Insurance law, as is so well shown by Sir James Park, a contemporary of Mansfield's, in his brilliant work on Marine Insurance. This system has been much extended in modern times, but it has been little changed and still stands as a lasting monument to the great Judge whom Mr. Justice Buller rightly called "the founder of the commercial law of this country."

The George Washington University.

R. W. VANCE.

SHORT NOTES.

Partner, expulsion.—*Limitation Act (XV of 1877), Sch. II, Articles 106, 120.*

Held, (Bampini and Sharfuddin JJ.)—One of the partners has no power to expel another without an order of the Court. Hence, an irregular expulsion cannot put an end to the partnership. Article 106 of the Limitation Act provides for a suit being brought within 3 years of the date of dissolution of the partnership and does not apply to the case of an expulsion of a partner to which Article 120 is applicable.

Babus Sharat Chunder Roy Chowdhry and Charu Chunder Bhuttacharjee for Appellant.

Babu Sarat Chunder Basak for Respondent.

Appeal dismissed.

1908.
February, 28.

Dwarka Das
v.
Chuni Lal Daga.

R. A. No. 84 of 1907.

Land Acquisition Act—Fishery—Subsidiary right—Reference, bad.

1908.
March, 10.

Raja Sham Chunder
Maddaraj

v.

Secretary of State.

B. A. No. 297 of
1904.

Appeal against the decree passed by the Land Acquisition Deputy Collector under section 18 of Act I of 1894.

Held, (Rampini and Sharfuddin JJ). Land is defined in the Land Acquisition Act as including and not meaning benefits arising out of land. Therefore *fishery rights* are not land, and it is only land, including the rights arising out of it, but not the rights detached from the land, that can be acquired under the Act. Though a person interested in an easement affecting the land is entitled to share in the compensation awarded for the land, an easement does not come within the definition of land.

What is to be acquired in every case under the Land Acquisition Act is the aggregate of rights in the land, and not merely some subsidiary right as a right of fishery.

It is the duty of the Civil Court to set aside the proceedings of, and a reference by, the Collector, which are bad, being contrary to the provisions of the Act.

4 C. L. J. 256 and I. L. R. 13 Bom. 653 referred to.

Mr. A. Caspersz and Babus Joges Chunder Dey and Joy Gopal Ghosha for Appellant.

Babu Ram Charan Mitra for Respondent.

Appeal decreed.

1908.
February, 24.

Guru Das Bakhit
v.

Kumud Bandhu Roy.

S. A. Nos. 2395 and
2994 to 2997 of
1904.

Noabad Taluks—Fresh settlement to be made with whom—Correspondence, value as evidence—Section 149 sub-section (3) of Bengal Tenancy Act (VIII of 1885)—Possession and title, question of—Incidental determination.

Appeal by the Plaintiff.

Held, (Mitra J.)—Settlement-holders of a temporarily settled estate are entitled, as of right, to fresh settlement, if Government settles the land again after the expiry of the old settlement.

Correspondences for settlement of Noabad lands are frequently used in ascertaining the practice with reference to Noabad taluks, though they may not be strictly admissible as evidence.

A suit under sub-section (3) of section 149 of the Bengal Tenancy Act is in the nature of an *inter pleader* suit and the property in dispute is the money deposited in Court. For determining who must get the money, the question of possession as well as the question of title must be incidentally gone into.

8 C. W. N. 248, 9 C. W. N. 492 and 11 C. W. N. 380 referred to.

S. A. No. 2174 of 1905 distinguished.

Moulvis Syed Shamsul Huda and Nuruddin Ahmed for Appellant

Babus Nilmadhub Bose and Akhoy Kumar Banerji for Respondent.

Appeals dismissed.

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CALCUTTA, APRIL 16, 1908.

}{ No. 8.

AGREEMENTS TO STIFLE PROSECUTIONS.

Agreements for stifling prosecutions are a well-known class of agreements which the Courts refuse to enforce on the ground of public policy. Contracts for the compounding or suppression of criminal charges for offences of a public nature a.e illegal and void under the English Common Law rule, which rests on the principle that contracts of that kind so necessarily tend to obstruct or interfere with the course of public justice and are manifestly opposed to public policy and mischievous to the interests of the State. The soundness and expediency of the rule seems unquestionable. It is essential to the good order and well-being of society, that persons who commit offences of a public nature should be brought to justice and a Court cannot take cognisance of a bargain to abstain from the prosecution of such persons. To countenance the agreements in question, would necessarily lead to trafficking in crimes and enable persons to convert them into a source of benefit to themselves. The reason of the rule is found clearly stated in the decision of the House of Lords in *Williams v. Bayley* (1), where, Lord Westbury says "Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony.
... .. If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed."

In *Collins v. Blartern* (2), it was held that a contract to withdraw a prosecution for perjury and consent to give no evidence against the accused, is founded on an unlawful consideration and void. Wilmut, Chief Justice, there observed: "This is an agreement to stifle a prosecution for wilful and corrupt perjury, a crime most detrimental to the Commonwealth; for it is the duty of every man to prosecute, appear against, and bring offenders of this sort to justice. Many felonies are not so enormous offences

(1) (1866) L. R. 1 H. L., 270, 220.

(2) 1 Sm. L. C. 369, 332.

as perjury, and therefore to stifle a prosecution for perjury seems to be a greater offence than compounding some felonies." It was also held in that case that illegality may be pleaded as a defence to an action on the bond. But perhaps a direct authority on the principle and scope of the English rule is to be found in the leading case of *Kear v. Leeman* (1), where the Court of Queen's Bench, after referring to the decision in *Collins v. Blantern* (2), said : "On the soundness of this decision no doubt can be entertained, whether the party accused were innocent or guilty of the crime charged. If innocent, the law was abused for the purpose of extortion ; if guilty, the law was eluded by a corrupt compromise screening the criminal for a bribe. We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. But if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it." Accordingly the Court held that an indictment for offences including riot and obstruction of a public officer in the execution of his duty cannot be legally the subject of a compromise. The decision was affirmed by the judgment of the *Exchequer Chamber* (3), where Tindal, Chief Justice, also laid down the law as follows :—"We have no doubt that in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit."

It would thus appear that a compromise of proceedings which are criminal only in form, and involve only private rights, may be lawful (vide also *Fisher & Co. v. Apollinaris Co.* (4), *Johnson v. Ogilvy* (5) and *Edgcombe v. Rodd* (6). In *Drage v. Ibberson*, (7) it was held that compounding a private misdemeanor, such as an assault, is a good consideration for a note. It is not necessary to prove that there was any express threat of prosecution, if the transaction in fact so amounted to a bargain not to prosecute. (*Jones v. Merionethshire Building Society*). (8) It would also not be necessary that the person accused should be actually guilty of the crime charged or that a conviction could

(1) (1844) 6 Q. B., 308.

(2) 1 Sm. L. C. 369, 382.

(3) 9 Q. B. 371, 392.

(4) (1875) L. R. 10 Ch. 297.

(5) 3 P. Wms. 279.

(6) 5 East, 308.

(7) 2 Esp. 643.

(8) (1872) 1 Ch. 178.

have followed. It would be sufficient if there was at least plausible ground for the prosecution and there was an agreement to abandon it. Reference may be made in this connection to the case of *Ward v. Lloyd* (1), where Coltman J. said: "I do not consider it material to consider whether or not the defendant was actually guilty of embezzlement; for if there was reasonable ground to suspect that he was, although the circumstances might not be such as to insure a conviction, and the warrant of attorney was given to induce the plaintiff not to prosecute, the consideration would, in my opinion, be illegal." The rule followed by Courts of Equity in giving relief to a party in the case of such illegal contracts was thus described by Knight Bruce, L.J., in *Reynell v. Sprye* (2). "When the parties to a contract against public policy or illegal are not *in pari delicto* (and they are not always so) and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him, as we know from various authorities, of which *Osborne v. William* (3) is one."

In India, agreements for stifling prosecutions would be void under section 23 of the Indian Contract Act, as the *consideration* or *object* of such agreements would be unlawful as being opposed to public policy. Moreover, the Penal Law of the country makes it a crime to enter into agreements to conceal certain offences, or to screen or abstain from proceedings against the offender with regard to certain class of offences, the law allows the parties to come to an agreement either not to take proceedings, or to drop the proceedings after institution, in a few instances without the leave of the Court, and in other instances with the leave of the Court. But there are other cases which cannot be compounded or arranged between the parties. The compoundability of offences is governed by section 345 of the Criminal Procedure Code (Act V of 1898) which clearly specifies the offences which are compoundable and the circumstances and the manner in which they may be compounded. The section also distinctly states (sub-section 7) that except as provided therein, no offence *shall be* compounded. If the offence is therefore so compoundable under section 345, Criminal Procedure Code, and could be settled in or out of Court, an agreement for the compromise of the offence would not be regarded as illegal or against public policy, the policy of the Criminal Law

(1) 6 M. and G. 785. (2) (1852) 1 D. M. G. 660 at p. 679.

(3) (1811) 18 Ves. 379.

being to allow a compromise in such cases. Generally speaking the compoundability or otherwise, under the Criminal Procedure Code, of the offence charged may be adopted as the test to see whether the offence is of a private nature concerning individuals or is of a public nature affecting the interest of the State. In the case of non-compoundable offences or those of a public nature, a compromise or agreement to withdraw the prosecution would be illegal and will not be enforced by the Courts. On the other hand the cases in which it would be an offence to enter into agreements to abstain from prosecution are governed by sections 213 and 214, Indian Penal Code. Under those two sections, it would be an offence to enter into an agreement to abstain from prosecution for offences &c., other than those which are declared compoundable by section 345, Criminal Procedure Code. Such being the law applicable to this country, I now proceed to consider briefly the Indian decisions on the subject, which are limited in number.

In *Mothoornath Dey v. Gopal Roy* (1), the suit was to recover money due to the plaintiff under a compromise of a criminal complaint of assault preferred by him against the defendants. The Court expressed the opinion that the offence in question being a misdemeanor peculiarly of a private nature, and occasioning a private injury, an agreement for a reasonable satisfaction in consideration of proceedings being stayed would not be illegal. It was therefore held that the plaintiff was entitled to recover under the compromise. Similarly in *Amir Khan v. Amir Khan* (2), where the defendant agreed to execute a kobala of certain lands in favour of the plaintiff in consideration of the latter's abstaining from prosecution of the former for an offence (assault) which was compoundable, it was held that the contract could not be regarded as illegal or against public policy and might be enforced. The next case to be considered is *Mothooranath Bhoemic v. Kenaram Kurmoker* (3). There the suit was for the recovery of a certain jewel and a bond deposited by the plaintiff with the first defendant in pursuance of a *razeenama* in a criminal case of wrongful restraint brought against the plaintiff by the second defendant. The *razeenama* filed by the second defendant was disallowed by the Criminal Court and the plaintiff was convicted. It was held that the action would lie as the charge was not one which it would have been illegal for the defendant to withdraw with the consent of

(1) 5 W. B., S. C. C., Ref., 16. (2) 3 C. W. N. 5.

(3) 7 W. B. 33.

of the Magistrate, and the offence charged consisted of an act for which an action for damages would lie in a Civil Court. In *Shaikh Nubbee Buksh v. Mussamut Bebee Hingon* (1), certain parties convicted of a criminal offence, in order to avoid apprehension entered into a compromise with the complainant who agreed to accept a sum of money as costs and as compensation for the disgrace he had suffered. They accordingly sold some property to the complainant in lieu of cash. The suit by the plaintiffs was to set aside the sale on the ground of illegal pressure used by the complainant. Thus the question directly at issue in the case was whether or not the transaction was brought about by coercion as alleged, and it was, under the circumstances, found against the plaintiffs. The Court observed that though the offence was one in which a compromise could not be legally admitted, yet as the Magistrate did admit it, and the parties acted in good faith, the position of the latter had not been affected.

In *Queen v. Balkishen* (2), it was held that a Court cannot take cognisance of an agreement to abstain from the prosecution of a person for the offence of perjury. In *Kandan Chetti v. Coorjee Seit* (3), the suit was to recover money on dealings in hundis which the plaintiff carried on with the second defendant and the plaintiff also relied on a promise by the first defendant to pay the amount due by his son (second defendant), it was found that the promise by the first defendant was made in consideration of the plaintiff's foregoing criminal prosecution of his son. The Court held that the consideration to support the promise in such a case was a vicious consideration and that the contract could not be enforced as it was opposed to public policy. A similar view was taken in the case of *Srirangachariar v. Ramasawmi Ayyanagar* (4), where the suit was for a declaration of the invalidity of an agreement on the ground of coercion and also because part of the consideration for it was the withdrawal of a pending criminal charge of trespass and theft laid against the plaintiffs. It was held that the consideration, under such circumstances is illegal and the agreement amounts to the stifling of prosecution.

In the case of *Pudishary Krishnan Nambudry v. Kavampally Kunhunni Kurup* (5), the plaintiff under threat of criminal prosecution for criminal trespass executed an agreement which conferred

(1) 8 W. R., 412.

(2) 8 N. W. P., H. C. R., 166.

(3) 2 M. H. C. R., 187.

(4) I. L. R., 18 Mad. 189.

(5) 7 M. H. C. R. 378.

certain rights on the defendant. The suit was to set aside the agreement and the plaintiff was held entitled to the relief. The case was treated as one of 'coercion' and Holloway J. observed: "If we first take it that the transaction was a violation of law, the entering into it would be a delictum on both sides, and the fact that the parties were not on equal terms, that one 'holds the rod and the other bows to it,' would destroy that party, and leave the question of coercion the residuum which the Court would have to consider." (*Smith v. Bromley* (1); *Smith v. Cuff* (2). Innes J. held that the agreement amounted to the stifling of prosecution for an offence not legally compoundable and that it was liable to be set aside notwithstanding *par delictum*. When an agreement which is otherwise lawful in itself, is sought to be avoided on the ground that one of the parties to it intended, by means of something to be obtained or done under it, to effect an unlawful purpose *e.g.*, suppressing criminal prosecution, the contract would not be rendered illegal unless the other party either knows or is a party to the unlawful purpose. In *Rajkristo Moitro v. Koylash Chunder Bhattacharjee* (3), the suit was to recover property under a deed of sale executed by defendant to plaintiff. The defence was that the sale was made for the purpose of raising money to be given to certain third parties as a bribe to induce them to withdraw a charge of criminal breach of trust which they had preferred against the defendant. There was no evidence to show either that the plaintiff knew of the agreement to suppress the criminal prosecution, or that any money had been paid in pursuance of such unlawful agreement. It was, therefore, held that plaintiff was entitled to recover. On the other hand, in the case of *Jeetoo Mahato v. Moneeram Mahato* (4), where the suit was for a refund of money voluntarily paid by the plaintiff to the defendant to induce him to suppress a criminal prosecution for the charge of murder, it was held that the plaintiff having been a party to the illegal purpose, could not recover the money.

But we have to consider a different class of cases where the agreement is entered into by the parties for the satisfaction of a bonafide claim or an already existing civil debt, and in such cases, the contract would be held to be valid, even though the debt arises out of a criminal offence, provided there is no agreement by the creditor to forego criminal prosecution. In the case of *Kessowji Tulsidas v. Hurjivan Mulji* (5), it was held that a man to whom a

(1) 2 Doug. 695.

(2) 6 M. and S. 100-165.

(3) I. L. R. 8 Calc., 24.

(4) 17 W. R. 84.

(5) I. L. R., 11 Bom., 566.

civil debt is due may take securities for that debt from his debtor, even though the debt arises out of a criminal offence, and he threatens to prosecute for that offence, provided he does not in consideration of such securities, agree to abstain from prosecution. He must not, however, by stifling a prosecution obtain a guarantee for his debt from third parties. In that case there was an agreement by the creditor to abstain from prosecution of the debtor, in consideration of a guarantee for the debt given by a third party and the Court held that the guarantee could not be enforced. The observations of Cotton L. J. in the case of *Flower v. Sadler* (1), also show the application of this principle; *viz.*, "It seems to me that there is a distinction between getting a security for a debt from the debtor himself and getting it from a third person who is under no obligation to the creditor. A threat to prosecute is not of itself illegal, and the doctrine contended for does not apply where a just and bonafide debt actually exists, where there is good consideration for giving a security, and where the transaction between the parties involves a civil liability as well as possibly a criminal act. In my opinion, a threat to prosecute does not necessarily vitiate a subsequent agreement by the debtor to give security for a debt which he justly owes to his creditor." The above two cases were approved and a similar view taken by the Allahabad High Court in the case of *Jai Kumar v. Gauri Nath* (2), where the suit was on a pro. note executed by a father and his son in favor of plaintiff, and the defence was that the pro. note was given for the purpose of avoiding the prosecution of the father for embezzlement. It was found that the pro. note was given to satisfy a bonafide claim which the plaintiff had against the father and was not given to stifle a prosecution. It was held that the debt could not under the circumstances, be regarded as immoral or illegal so as to relieve the son's liability.

I have to consider next the case of *Subbraya Pillai v. Subbraya Mudali* (3), which illustrates an important principle in regard to the agreements in question. In that case, the plaintiff a resident of Pondicherry, charged the second defendant before the French legal authorities, with having fraudulently abstracted from his house a bond executed by the second defendant in his favor and he obtained the arrest and extradition from British territory of the second defendant, as also of his brother first defendant. The latter on his way to Pondicherry met the plaintiff and a settlement of accounts took place under which defendants

(1) (1882) L. R., 10 Q. B. D., 572.

(2) I. L. R., 28 All. 718.

(3) 4 M. H. C. R. 14.

5 to 8 made themselves liable by executing the plaint bond for the sum found due to the plaintiff, the consideration being the agreement of the plaintiff to discontinue further proceedings on the criminal charge. The Court at Pondicherry sanctioned the agreement as a compromise by civil redress and suspended further proceedings in accordance with the law in force in the settlement. It was held that the contract was enforceable, the Court (Scotland C. J. and Collett J.) observing : " But it is clear to us that the Common Law rule can have no application to a contract for compounding the prosecution of criminal proceedings for an offence against the municipal law of a foreign country and committed there, the law of that country permitting such a transaction ; and thus whether the contract is entered into there or in British territory. ... in whichever territory, then, the contract was entered into, the essential question is substantially the same, *viz.*, whether the compromise was in its nature prejudicial, as being in contravention of public policy under the Government of British India, or injurious to the good order and interests of society in regard to the due administration of public justice or otherwise. And that we are of this opinion is not in any degree shown by the facts of this case."

Lastly it has also to be noticed that as a suit would not lie on an agreement to stifle prosecution, so it cannot also be pleaded as a defence to an action. This is clear from the decision in *Dalsukhram Hargovandas v. Charles Debreton* (1). There the plaintiff sued the defendant in damages for wrongful arrest and confinement. The defence pleaded an agreement whereby the parties had agreed to settle their differences in consideration of compounding some criminal charges (Sec. 143 and 447, I. P. C.) one of which was not legally compoundable, and which were then pending between the parties in the criminal Court. It was held that the defendant could not enter into a valid and binding agreement the object of which was to stifle prosecution, and that the agreement, therefore, could not be set up as a defence to the action.

S. VAIDYANATHA IYER, B.A., B.L.

Cuddalore.

(1) I. L. R., 28 Bom. 326.

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CALCUTTA, MAY 1, 1908.

} NO. 9.

REVIEWS.

Private Trading Partnership—by J. W. SMITH, K. C., LL. D.—Effingham Wilson, London, 1908, 1s. 6d. net.—This is one of Wilson's Legal Handbook Series. The first edition of it was published half a century ago, and it has now reached its thirtieth thousand. Commendation is obviously superfluous. It is sufficient to say that the new edition takes due account of recent legislation on the subject, at the same time it retains its character of a simple and intelligible statement of the law on the subject which is indispensable to all persons, lawyers and non-lawyers, who engage in partnership business.

Whipping in India—by HIRALAL CHAKRAVERTI, M. A., B. L.—Majumdar Library, Calcutta, 1908—In this pamphlet the writer puts forward very effectively a plea for the abolition of whipping in India. It is hardly likely that the legislature would give effect to so drastic a suggestion, but it is a matter for congratulation that a move has now been made in the right direction and the application of this barbarous mode of punishment will be considerably restricted in future.

The Police Act—by H. C. SINHA, SYLHET, 1907—Price Rs. 3.—Mr. Sinha is favourably known to the profession for careful editing of several important Acts. His present venture is likely to remove a long-felt want. The case-law on the subject has been analysed and appropriately referred to under the various sections, while the extracts given from the proceedings of the Legislative Council give valuable help in the removal of many obscurities. The edition may be strongly recommended to members of the legal profession as well as to police and executive officers.

Magistrates' Court Manual—by P. H. CHATTERJEE, B. A.—R. CAMBRAY & CO., CALCUTTA, 1907, Price Rs. 4.—This is really an edition of selected portions of the Criminal Procedure Code. The author has annotated those portions of the Code which apply to Magistrates' Courts. In addition to this, we have Rules and Orders and notes of cases which relate to the subject. The most interesting part of the volume is a brief sketch of criminal administration in India, which introduces it to the reader. We do not remember so much useful information gathered into a similar space. The work will be found useful by all persons who have either to preside over or practice in Criminal Courts.

Digest of Indian Cases for 1907.—by S. SRINIVASA AIYAR B. A., B. L., MADRAS 1908.—This new volume of Mr. Aiyar's Digest retains all the good features of previous issues, namely, conciseness and accuracy of statement. In addition, we have an elaborate index of cases followed, overruled, explained and distinguished.

Index of Cases Judicially Noticed, 1907.—by T. S. SUBBAMANAYA AIYAR, B.A., B.L.—TANJORE, MANIYA & CO., 1908—This is a fresh instalment of a valuable publication which we favourably noticed before. Two new parts have been added which referred to the cases mentioned in Cases and Comments in various Reports as also in leading Articles.

Oudh Digest.—Supplement for 1906.—by GOKARAN NATH MISRA, M. A., LL. B., LUCKNOW 1907.—This is a Digest of all cases reported in Vol. 9 of Oudh Cases and is indispensable to all who possess that series of Reports.

SHORT NOTES.

1906.

April, 22, 27.

Maharaja Manindra
Chandra Nandy,
v.
Rani Mani Kumari
Sahaba,

S. A. No. 1236
of 1906.

Bengal Chowkidari Act (VI of 1870 B.C.), Secs 48, 61. Settlement in contravention, nullity—Limitation Act (XV of 1877) Sec II, Arts. 14, 144.

Appeal by the Defendant No. 1.

Held, (Rampini and Sharfuddin JJ).—A Collector cannot settle lands in contravention of the provisions of section 43 of the Bengal Chowkidari Act and that, if he does so, his order is a nullity. Article 14 of the Limitation Act is not applicable.

The provisions of section 61 of the Act only make the order of the Commissioner final and conclusive on the matters specified in the section, viz., (1) the identity of the land determined to be Chowkidari Chakran land, (2) the boundaries thereof, (3) the name of the village for the benefit of which such lands are assigned, and (4) whether such lands be or be not Chowkidari Chakran lands. They do not make final and conclusive the question as to the semindar to whom the lands are to be transferred.

Babus Ram Charan Mitra, Gelap Chandra Sircar, Jyoti Prasad Sarbadhikary and Hemendra Nath Sen for Appellant.

Babu Ram Chunder Mozumdar for Respondent.

Appeal dismissed.

1908.

April, 23.

Gobinda Mohini
Dasi
v.
Pati Rokhan Sukul,

S. A. No. 1345
of 1906

Limitation Act (XV of 1877), Secs. 5, 12—Vacation—Deduction.
Appeal by the Plaintiff.

A suit was decided on the 23rd September 1905, decree signed on the 27th September 1906, the Court was closed on the 27th September till 30th October 1905; copy applied for on the 31st October and copies of decree and judgment were ready on the 7th November 1906. The appeal was preferred on the 8th November 1905:

Held, (Rampini and Sharfuddin JJ).—That the appeal was in time.
I. L. R. 19 All 342 and I. L. R. 25 Bom. 586 followed.

Babu Jyoti Prasad Sarbadhikari for the Appellant.

Babu Hem Chunder Sen for Babu Mohini Mohun Chatterjee for the Respondent.

Appeal allowed.

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CALCUTTA, MAY 16, 1908.

{ No. 10.

CONTRIBUTORY NEGLIGENCE.*

The opinions in the earliest cases upon contributory negligence, *Butterfield v. Forrester* (1), and its little known predecessors, *Conden v. Fentham* (2) and *Clay v. Wood* (3), offer no indication that the Court is aware that any new doctrine is being announced. That a plaintiff who by his own misconduct in conjunction with that of the defendant has brought harm upon himself, cannot recover damages, is stated as a well-settled rule. There is, therefore, no discussion of general principles, no logical argument applying such principles to the particular facts and showing that they necessitate the result reached by the Court. All attempts to ascertain upon what legal principle the defence of contributory negligence is based, are therefore efforts *ex post facto*, to explain and account for a result already reached apparently unconsciously. The ready acceptance by the profession of the decision as conclusive, the entire absence of any attempt by counsel to attack it, seems clearly to negative the idea that it was an innovation, an anomalous rule applicable only to its own circumstances,—justifiable only by its convenience and utility. Had it not been the exhibition under the peculiar circumstances of some well-settled, universally recognized and accepted general legal conception, there can be no doubt that its introduction would have been sharply contested, instead of hardly causing a ripple in the placid surface of professional thought.

Setting aside, therefore, the suggestion that the defence of contributory negligence is a pure anomaly justified by its utility under the peculiar facts under which it arises, it is necessary to examine carefully the theories upon which it has been from time to time attempted to explain the defence, to see whether any of them in reality offers a satisfactory explanation, and if not, whether there is in fact any fundamental principle of legal thought to which it can be ascribed.

Three theories are commonly advanced as to the basis of the defence of contributory negligence. It is maintained that it

* Reprinted from the Harvard Law Review, Vol. XXI, No. 4, omitting the elaborate footnotes.—ED.

(1) (1809) 11 East 60. (2) (1799) 2 Esp. 685. (3) (1803) 5 Esp. 44.

depends on the application to the particular facts of the rule governing (1) proximity of legal causation ; (2) indemnity or contribution between joint tortfeasors ; or (3) voluntary assumption of risk as expressed in the maxim *volenti non fit injuria*.

Taking first the theory that the plaintiff's wrongful assisting act breaks the chain of proximate causation between his own harm and the defendant's misconduct, it is necessary to ascertain if possible what proximity of legal causation is, and what part it plays in legal liability.

It would be obviously opposed to any possible conception of justice that any one should be required to answer for a harm unless he had actually caused it. It is therefore always a vital pre-requisite to recovery to establish that the plaintiff's harm was caused by the defendant's alleged misconduct. As to what is to be regarded as the cause of any given result admits of much difference of opinion. It is possible to regard as a cause any *causa sine qua non*, without which the result would not have happened, including every antecedent to the most remote, or, again, only to consider that a cause which operates directly to produce the result. Or the true conception may well be taken to lie between these two extremes.

Legal proximity of causation may be defined as that conception of cause and effect which has been adopted by the Courts as the test by which to ascertain whether a particular harm is to be ascribed to a particular act or omission as its consequence as a pre-requisite to the imposition of legal responsibility therefor. This conception has from time to time varied. The primitive conception of a sufficient legal cause was a *causa sine qua non*. When this idea was abandoned, the rebound carried judicial opinion to the opposite extreme, that no one should be answerable beyond (1) the direct result of his misconduct, his trespass, his semi-criminal *delict*, or (2) those indirect results actually intended.

As society became more highly organized, civilization more complex, it was evident that to prohibit violence and acts intended to be harmful was not enough ; some further protection was required. Similarly the citizen injured found little real compensation in the good intentions of him who had without violence and unintentionally brought harm upon him. It was necessary to add something to this test of wrongfulness, to this narrow field of liability, so as to enforce a decent social decorum, and to give compensation more really proportionate to the

harm sustained by one whose rights were without violence, or unintentionally invaded without fault of his own. It thus came to be said that "every man must be presumed to intend the natural and probable consequences of his act." Here the Judges appeared to be merely laying down a rule of purely procedural law, dealing with the effect which might be given to evidence,—a matter manifestly within their powers, and part of their function as presiding officers of a Court of justice. Yet in so doing, as in so many other similar cases, without the appearance of judicial legislation, without incurring the stigma attached to law reformers, they substantially changed the whole conception of legally wrongful conduct, and immensely enlarged the limits of legal responsibility for admitted injuries. The presumption, by precluding inquiry into what was actually intended when the result was natural and probable, established between the two things a forced equivalence in legal effect. The whole conception of legal causation was enlarged, and an actor became as fully liable for the natural and probable consequences of his act, though unintended, as before he had been when the result had been foreseen and designed (1).

In defining the test by which this new social duty is to be ascertained, this enlarged measure of responsibility applied, the tendency of modern judicial opinion is overwhelmingly toward a full recognition of the popular conception of what is natural or probable as the standard to be adopted. The question, usually one for the jury, is to be solved by them in accordance with what men like themselves would actually foresee as likely to result from the conduct in question, or after the event, is seen to be in accordance with common experience, such as theirs, of the known and actual course of nature. It is the actual foresight of the average man, in view of the circumstances which he knows or should know, of the real probability of injury to others, picturing the future course of events, the real conditions which will probably be created, the effect of the known habits of human beings and of the ordinary operation of usual natural forces under such conditions, as affecting the injurious tendency of his acts. This is what determines the wrongfulness of the act so far as it depends solely on proximity of causation. So,

(1). But while a new conception was added, the old remained and still remains. No question of natural or probable causation arises where the actor actually intended the specific harm suffered—for that he is now answerable, as he always was punishable, though to others it would appear both an unlikely and abnormal result.

if the wrongfulness of the act be admitted, it is the actual course of nature depending on the orderly operation of known natural forces, including again the customary habits of mankind under given circumstances, by which proximity of the harm to such wrong is ascertained.

The proximity between the act done and the harm sustained is, however, only one step to the determination of the final question of legal liability. This depends also on many other principles of limitation of legal liability, entirely distinct, in no way depending on causal connection, having their basis in some cases in the historical development of the law, in others in principles of policy, in conservative instinct at times retarding the growth of advanced legal conceptions, or in deep-rooted fundamental principles of justice as conceived and developed in the common law of England.

There was prevalent in the early part of the nineteenth century, just at the time when the earliest cases of contributory negligence were decided, a principle of limitation of liability, purely legal, the creature of judicial rather than popular conception of justice, stopping recovery short of either the probable or natural result of the act complained of. This rule or principle, now practically obsolete, was thus stated by Lord Ellenborough in the leading case of *Vicars v. Wilcocks* (1). "Special damage"—the case was one of slander—"must be the legal and natural consequence of the words spoken. Here it was an illegal consequence, a mere wrongful act of the master" (who discharged the plaintiff in consequence of what the defendant had said). "His Lordship asked whether any case could be mentioned of an action of this sort, sustained by proof only of an injury sustained by the tortious act of a third person."

(1) (1806) 8 East. 1.

(To be continued.)

The Calcutta Law Journal.

VOL. VII. }

CALCUTTA, JUNE 1, 1908.

{ NO. 11.

The Hon'ble Mr. Justice B. G. Geidt.

We have great pleasure in presenting our readers with the portrait of Mr. Justice Geidt, who retired from the High Court Bench on the 11th April, 1908.

Bernard George, son of Rev. Bernard Geidt of the Church Missionary Society, was born at Burdwan on the 11th March, 1855. Sent home for education he was entered at the Shrewsbury School, at that time one of the foremost classical schools in England.

In 1874, he passed the open competition for the Indian Civil Service and came out in November 1876, his first station being appropriately enough, Burdwan. After a year he was transferred to Assam and served for 10 years as Assistant Commissioner in Sylhet and Cachar.

Those were the days when none but Civilians of ripe experience were appointed to the Judicial Bench and the complaint regarding "Boy Judges," which one so frequently hears of now-a-days and which has found expression even in the Imperial Legislative Council had not then begun to be heard. It was not till after more than 11 years of service that Mr. Geidt was appointed to officiate as a District Judge and he was confirmed as such after another 6 or 7 years. He was posted to Bankura as District and Sessions Judge in January 1893 and with short intervals of leave and acting appointments elsewhere, he remained there for five years. He was Judge of Tippera for $2\frac{1}{2}$ years. After the High Court had remanded the *cause célèbre*, *Emperor v. Osman Ali* better known as the Pennell case of Noakhali, Mr. Geidt was selected by the Government for trying it, and his decision of the case which was upheld by the High Court gave wide satisfaction.

Mr. Geidt was appointed in May 1901 to officiate as Superintendent and Remembrancer of Legal Affairs, Bengal.

It was on the 11th April 1902 that he was first appointed to act as a Judge of the High Court, an appointment in which he was confirmed on the retirement of Mr. Justice Stevens in 1904.

Six years to the day from when he first joined the Court, Mr. Justice Geidt retired from the service on the 11th April 1908.

Though too delicate in health to be able to enrich our law reports with many brilliant judgments, Mr. Justice Geidt will be long remembered by the profession for his sound common sense and for the sterling qualities of heart which made him uniformly courteous to all who appeared before him.

Reference may be made to one or two notable cases in the decision of which Mr. Justice Geidt took part. In the case of *Raja Pramada Nath Roy v. Raja Ramani Kanta Roy* (1) a question was raised as to the nature of a suit by a co-sharer landlord for recovery of the whole rent of the tenure. The case was heard in the first instance by Mr. Justice Ghosh and Mr. Justice Geidt; as the learned Judges could not agree, the case was heard by Mr. Justice Brett who agreed with Mr. Justice Ghosh. Upon appeal to the Judicial Committee, the decision of the High Court was reversed, and the view taken by Mr. Justice Geidt was approved as correct. In the case of *Bibijan Bibi v. Sachi Bewa* (2), where a question arose as to the effect of a sale under the Transfer of Property Act upon the mortgage lien, the view suggested by Mr. Justice Geidt was adopted by the Full Bench. In the case of *Abinash Chandra v. Paresh Nath* (3), Mr. Justice Geidt gave a very lucid explanation of the grounds upon which the Judicial Committee had held judgments not 'inter partes' to be admissible in evidence. In the case of *Begu Singh v. Emperor* (4), where the true meaning of section 476 of the Criminal Procedure Code was much debated, Mr. Justice Geidt took a view which differed from that of the majority, and it must be conceded that a great deal may be said in support of his view. In the case of *Mohunt Lukhan Narain Das v. Jainath Pandey* (5), where a question arose as to the heritability of the interest of a non-occupancy raiyat in a holding, Mr. Justice Geidt reviewed the question in a learned judgment. In the case of *Amar Chandra Kundu v. Sebak Chand* (6), where a question arose as to the powers of an execution Court to proceed against a son of the judgment-debtor who had taken the estate by survivorship, Mr. Justice Geidt wrote a powerful dissentient judgment, in favour of the contention of the son. Looking to these and other judgments, one cannot but think it unfortunate for the cause of the administration of Justice in this country, that we should be so early deprived of the services of so learned and conscientious a Judge.

Mr. Justice Geidt took a leading part in the establishment of the Calcutta Club, an institution intended to be the common meeting place for Indians and Europeans, and though one may well hesitate before waxing enthusiastic over its success, one cannot but appreciate the genuineness of the feelings of its founders.

We wish Mr. Geidt many years of health and happiness in his well-deserved retirement after 32 years' service.

(1) 7 C. L. J. 139.

(2) 1. L. R. 31 Calc 863.

(3) 9 C. W. N. 402.

(4) 5 C. L. J. 508.

(5) 5 C. L. J. 459.

(6) 5 C. L. J. 491.

CONTRIBUTORY NEGLIGENCE.

It is highly doubtful if this limitation has any real relation to proximity of causation. To consider the last acting efficient cause, the final decisive impulse, as the sole responsible cause would merely be to change the judicial conception of causal connection sufficient to create *prima facie* liability. Since, however, the last actor, the author of the final decisive act, is regarded as the sole center of legal responsibility only when such act is legally a wrong, it is evident that it is not with the causal relation alone that one is dealing, but with the causal relation plus some restrictive principle or policy of remedial law, which, where the injured party has recourse against the last wrong-doer, considers him sufficiently protected, and relieves the antecedent wrong-doer of an onerous and superfluous burden.

Mr. Beven is therefore probably right in treating this as a separate limitation of legal liability quite distinct from proximity of causation. However, courts and text-writers less discerning than Mr. Beven, seeing in the rule of *Vicars v. Wilcocks* (1) an apparent kinship to proximity of causation in that it dealt with the liability for the effect of acts as depending on the legal character of an essential link in the chain of actual causation, treated it not as a separate principle of law stopping liability at a point short of the limits of actual proximity, but as an auxiliary rule enforcing, where there are successive acts of mis-conduct, an arbitrary legal conception of proximity, making the last act the sole legal cause.

The disability of the plaintiff, whose negligence was the *final* decisive cause of his harm, to recover, is but an obvious application of the rule in *Vicars v. Wilcocks* (1) to the facts of the case. Similarly the so-called Doctrine of the Last Clear Chance, whereby a defendant whose negligent act was the final decisive cause of the accident was liable to the plaintiff even though the latter had at an earlier stage been guilty of some default placing him within the reach of the effects of the defendant's act, is also a necessary result of that rule applied to such facts, and not, as it appears today, an anomalous exception based on the hardship which would result from the rigorous and logical application of the general principles of contributory negligence. In *Davies v. Mann* (2), cited as the earliest case of this sort, the only novelty is the extension to successive acts of mere omissive negligence of principles applied in *Clay v. Wood* (3) to successive conscious and intended misconducts.

(1) (1806) 8 East. 1.

(2) 10 M. & W. 546.

(3) 5 Esp. 444.

But where the misconducts were not successive, but simultaneous, the rule of *Vicars v. Wilcocks* (1), the principle limiting legal liability to the last wrongdoer, had no application. There must be, to use Mr. Brown's phrase, a last legally responsible wrongful agent before there is a sole center of liability. If the acts were simultaneous, the influence of the early semi-criminal aspect of tort which punished a trespasser for his wrong, was still strong enough to hold each wrong-doer, as the criminal law does, responsible *in solido*. The injured party might, at his election, collect from either of the independent wrong-doers whose acts together, judged by the popular view of proximity, had caused his harm, the full loss sustained, and it was no defense, not even a mitigation of damages, that others beside himself had in part caused the loss; not even that but for such other's conduct his act might or would probably have been harmless. Yet when the case of a plaintiff guilty of negligence contemporaneous with that of the defendant came up for decision in *Vennall v. Garner* (2) and in *Pluckwell v. Wilson* (3), it was held that the plaintiff could not recover for harm caused in part by each, Bayley, B., saying in the first case, "If the mischief be the combined negligence of both, they must remain in *statu quo*, and neither can recover against the other;" and Alderson, B., a most accurate judge, charged the jury in the second, that, "If the plaintiff's negligence in any way concurred in producing the injury, the defendant is entitled to the verdict."

In fact, taking legal cause to include, as in effect it did at that time, the modification that an antecedent misconduct affording an opportunity for a later default to work mischief was not the legal cause thereof, the rule might be stated thus: If the plaintiff's act was any part of the legal cause of his harm, he can have no legal redress against a defendant whose misconduct was also part of the legal cause of the harm. No existing conception of legal even as distinguished from actual causation was adequate for this situation. Evidently some further fundamental restrictive principle bars recovery.

Does this then existing conception admit of a modification which without utterly destroying the fundamental ideas underlying it will account for the result? Does the added element of the plaintiff's authorship of one of the concurrent negligent causes render his harm remote in any sense cognate to that recognized by the existing conception of legal causation? So far legal causation has dealt with the relation of act to result as cause to effect.

(1) (1806) 8 East. 1.

(2) 3 Tyrw. 85.

(3) 25 C. & P. 375.

The modification in *Vicars v. Wilcocks* (1) added to a consideration of the actual sequence of events a scrutiny of the legality or illegality of the various steps therein, but even so modified the rule deals with the various links in the chain of causation as between a harm as a physical consequence and the act which is alleged to cause it as an act, and is applied impartially to ascertain in all cases whether a sufficient causal relation exists to render the actor liable for the harm suffered. The change now proposed is not a modification, as this is, of the primary conception of proximate causation; it is, on the contrary, an entirely new and antagonistic idea. Admittedly it does not afford a test whereby in all cases the question of the defendant's liability, in so far as it depends on the proximity of causation between his act and the plaintiff's harm, is to be determined. On the contrary, it applies only in particular cases and between parties litigant to destroy a chain of causation sufficient to render the defendants *prima facie* liable, and it regards an act, already seen to be a sufficient link in the chain of legal causation, as a break therein, not because any new fact has altered its actual position in the sequence of events, not even because of some newly discovered legal characteristic, but simply because the person legally responsible therefor is seeking compensation for the harm it has aided in bringing on him. This is not a modification of the original conception of legal proximity; it is an entirely new and antagonistic principle. The one deals with the relation of fact to fact as *facts*, the other concerns itself with the merits and demerits of the authors thereof as parties litigant. Since the facts and the connection between them remain the same by whomsoever they are done, and since these facts are already seen to be legally cause and effect, it is impossible to say they are no longer so connected because the same party who sues is legally the author of one of those assisting acts already seen to be sufficient links in the chain of causation,—at most one can say merely that they are deemed or presumed to break the chain of causation. But, as in all cases when a presumption demands that two things shall be considered the same, which reason tells us may well be quite different, we are driven back to the final inquiry—what rule of remedial law—what principle of public policy or what fundamental conception of justice common to all jurisprudence or peculiar to our common law, requires the arbitrary legal equivalence between two things not in their nature necessarily similar, or even, as in this case, fundamentally opposite to one another?

No conception of legal cause which has ever been applied to

(1) (1806) 8 East. 1.

ascertain legal liability in general will account for the doctrine of contributory negligence in all of its phases. While the rule in *Vicars v. Wilcocks* (1) might account for it where the negligences are successive, it has no application where they are concurrent. The modern view that legal causation depends on what is actually probable and natural, and that the mere wrongfulness of an existing act is *per se* immaterial, leaves even the case of successive negligences without support in the now existing principles of legal proximity of cause and effect. To ascribe the defense of contributory negligence to a principle which never fully accounted for it, and which now fails to account for it at all, only serves to cloud the subject of legal causation, already replete with difficulties, by introducing a new and alien conception, without aiding in ascertaining the final basis upon which rests the inability of a plaintiff, whose harm has been caused in part by his own misconduct, to recover from his fellow delinquent.

Clearly the defense of contributory negligence cannot be ascribed to the rule which denies contribution or indemnity between joint tortfeasors. Contribution and indemnity are concerned with joint wrongdoers : *first*, those who associate themselves to do the particular wrongful act, or from some prior association are as a group under some joint liability ; *second*, those who are by reason of some rule of remedial legal policy held jointly liable for the conduct of the actual wrongdoer, or the condition of the injurious thing ; *third*, those who are under successive duties in regard to the same dangerous condition ; or, *fourth*, where the plaintiff relying on the defendant's apparent right to deal with property so acts by his authority as to incur liability to the true owner. It has never been applied to cases of concurrent but independent wrongs to the combined effect of which the harm is due and where the only point of contact is in the combination of their effect in bringing about the final catastrophe.

Even in their application to these widely different fields the development of the two principles has been entirely separate ; the limitations and exceptions to them not merely distinct and different, but often the very opposite to one another.

1. Contribution, though refused between persons actually themselves the wrong-doers, is allowed where they are not personally delinquent, but are both liable for the acts of the actual wrong-doer by virtue of some relation in which they stand to him. Indemnity is given to the person morally innocent but legally liable, as against the actual wrongdoer whose misconduct has brought the liability upon him. On the other hand,

(1) (1806) 8 East, 1.

a plaintiff is as much barred by his servant's negligence as his own, though the defendant is personally in fault. So, while the rules of contribution and indemnity regard as vital the difference between actual wrong and legal liability, contributory negligence regards them as immaterial.

2. In ascertaining the right to indemnity the law distinguishes between primary and secondary duties, between active misconduct and mere omission of duties of protection, between the creator of the dangerous condition, and him who should have protected the injured party from it. In contributory negligence the plaintiff is as completely barred from recovery where he has failed to take self-protective measures against a danger created by the defendant, as where he has himself created the danger and the defendant has failed to protect him therefrom. In fact, the last clear chance doctrine enforces the very opposite idea. It is the sequence in time of the successive negligences which is vital. He whose negligence is the final decisive cause of the harm must answer for it; while in regard to the right to indemnity, the actor, the creator, is liable over to him whose neglect of his positive duty is the final efficient cause, who had the last clear chance, if he had done what he was legally bound to do, to avert the harm.

It seems equally undoubted that the defense of contributory negligence is not a mere variation nor an application to the specific facts of the rule that one who voluntarily encounters a known risk can blame no one but himself for the ensuing harm. In the earlier cases there was little, if any, attempt made to distinguish between voluntary assumption of risk and contributory negligence. Whether the risk, though perceived, was voluntarily encountered, whether it was, though not seen, obvious if the plaintiff had used his senses, or capable of being discovered had he been properly on the alert, or whether he had, after knowledge of his danger, failed to exercise that care which even then would have sufficed to avert the harm, he was equally barred. It mattered little whether his conduct was regarded as an assumption of risk or as contributory negligence. Nevertheless there arose from time to time cases where the two had to be distinguished, because, while contributory negligence was no bar, the voluntary assumption of a known risk did prevent recovery. Early cases are therefore not entirely wanting which recognize the inherent difference between the two.

Of late years, however, there has come into existence a constantly increasing class of cases where, for various reasons, a risk perfectly recognized is held not to be assumed by one placing himself within reach of it, but where none the less he may be

barred if he is guilty of contributory negligence. The distinction between voluntary assumption of risk and contributory negligence has thus become of immense practical importance, and it is essential to fix with precision the exact boundary between the closely adjacent fields which they occupy.

One suggested line of demarcation may be at once dismissed. The weight of reason and of authority is against the view that voluntary assumption of risk is confined to relations created by contract, and arises out of an implied term of the contract creating the relation. It is, on the contrary, an incident inevitably attached by law to all relations and associations, contractual or otherwise, which are voluntary upon both sides. The plaintiff's actual consent to run the risk is immaterial ; having no right save that derived from the defendant's consent to enter into relation or association with him or his property, he cannot complain because the defendant makes that association dangerous. He may either take it as he finds it or leave it, but if of his own free choice he chooses to enter into association with the defendant, he must *perforce* accept the risks obviously inherent therein, no matter how strongly he protests against them, or how emphatically he expresses his unwillingness to run them.

The differences between voluntary assumption of risk and contributory negligence are many and fundamental.

1. Voluntary assumption of risks negatives the idea of even *prima facie* liability. If the plaintiff has no legal right to place himself in juxtaposition with the defendant, his premises or business, if his association therewith is entirely dependent upon the latter's consent, the defendant owes him no duty in regard to the condition of his premises or plant or the system which he chooses to adopt in the conduct of his business, save that the actual shall conform to the apparent conditions. If the danger be apparent, there is no further duty ; if it be not apparent, then notice of it must be given.

2. The plaintiff must voluntarily, consciously, and deliberately elect to encounter a known risk. No risk can be said to be assumed until the plaintiff has knowledge of the danger and elects to enter into the association subjecting him to it, or, having an opportunity to discontinue an association in which some new danger is discovered, chooses not to do so.

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3. The plaintiff's inability to recover where the danger being known is voluntarily encountered is not based upon any thought that in so doing he has acted improperly, or has fallen away from the normal standard of proper behavior. It is based on the idea that the plaintiff, being free to take or leave the association, has, with full knowledge of its danger, chosen to take it, and upon the idea that the defendant, being free to refuse to allow the plaintiff to come into juxtaposition with him at all, owes him no duty beyond that of full disclosure of the true conditions under which the relation is to be maintained. Therefore it does not matter whether, in view of the extent of the danger, and of the advantages to be derived from encountering it, a reasonably prudent man would or would not have subjected himself to it. The risk may be of the slightest and most remote, the object to be attained by encountering it the very livelihood of the plaintiff; his act may therefore be prudent or even praiseworthy, but he is just as much barred from recovery, the defendant owes him no greater duty than if the risk was enormous and the advantage to be gained trivial and so his conduct both reckless and foolish.

1. Contributory negligence, upon the other hand, is an affirmative defense, operating at a later stage of the proceedings to displace a liability *prima facie* established. A finding by the jury that the plaintiff has not assumed the risk voluntarily does not negative the existence of contributory negligence on his part, nor prevent the defendant from setting it up as a defense.

2. Contributory negligence excludes the idea of deliberation. It involves rather an unintentional failure to measure up to the self-protective duty of a man situated in a civilization where dangers are constantly occurring. If the danger is perceived and consciously encountered, the case is more properly one depending upon (a) whether the plaintiff in so doing acted voluntarily, uncoerced by any improper pressure, and having no legal right to do the act in the course of which he must subject himself to it, or (b) whether, though he has such legal right, the danger

is so great that it is unreasonable in the face of it to insist upon its exercise.

3. The very essence of contributory negligence is that the plaintiff has misconducted himself, that he has done or omitted to do something which under the circumstances of the case a reasonably prudent man would not have done or omitted to do.

These three salient points of difference show sufficiently the essentially dissimilar character of the two defenses.

Save in one particular, that of providing safe conditions of association, one who allows another to enter into even a voluntary relation with him is bound thereby to take care that no act or omission on his part shall subject that other to risks not necessarily involved in the known conditions under which that relation is to be maintained. And the measure of this care is that which a reasonably prudent man would under the known circumstances realize to be necessary to the plaintiff's safety. While the defendant is not bound to make the conditions safe, he is not entitled to act as though they were safe; their dangerous character is one of the circumstances in the light of which the care that a reasonably prudent man would, and consequently which the defendant should exercise to secure the plaintiff's safety is to be ascertained. In a word, voluntary assumption of risk merely negatives the duty to take care to provide safe conditions for association, and so prevents the failure to do so from being actionable negligence when the plaintiff's harm results, so far as the defendant's conduct is concerned, from this alone; it does not affect the defendant's duty in other particulars or the plaintiff's right to recover where his harm is caused by the breach of any duty owing by the defendant to him, nor is it in such case a defense that the defective condition was a concurrent and necessary cause of his harm. So too, where, for any reason, a risk, though knowingly encountered, is held not to be voluntarily assumed, while this throws upon the defendant the duty among other precautions for the plaintiff's safety to make the premises safe, and allows the plaintiff to recover where no other fault on the defendant's part aids in bringing on the harm, it does not insure him against every harm attributable to such conditions, nor relieve him from his duty to conduct himself as a reasonably prudent man would under the circumstances, again including the known dangerous condition.

Consequently, while the plaintiff may be entitled to find the premises or plant safe, and thus his mere act in bringing himself

within reach of a known dangerous defect therein in order to assert his right, may not bar his recovery, the risk may be so imminent, the danger so great, so out of all proportion to the value of the object to be gained by encountering it, "that no sensible man would have encountered it" to enjoy the exercise of the right. It may perhaps be doubted whether, in fact, this can be said to be in any true sense contributory negligence; contributory misconduct it certainly is. Perhaps to distinguish it from contributory negligence in its primary sense of a mere unintentional omission of due caution, of failure to take self-protective care, it may well be termed a contributory default, in the nature of an unreasonable insistence upon the extreme exercise of legal right in the face of manifest and imminent danger.

The difference between such contributory default and voluntary assumption of risk is merely one of degree rather than of kind. But even though the risk be not so great as to make the mere encountering of it unreasonable and improper, the plaintiff is still bound to take such care as a reasonable man would deem necessary, in view of the known defective condition of the premises or plant, so that no act or omission of his while upon them or using them shall unduly increase the dangers necessarily inherent in such defective conditions. The difference between assumption of risk, or such contributing default, and true contributory negligence in its primary and proper meaning of mere unintentional conduct falling below the standard of proper social behavior, is not one "of degree of proximity" alone but of kind. Voluntary assumption of risk is the mere passive subjection by the plaintiff of himself to the risk of injury inherent in known defective conditions. Contributory negligence is an act or omission on the plaintiff's part tending to a reasonable probability to add new dangers to his situation, not necessarily incident to the known defective conditions, and bringing upon himself a harm not caused solely by them, but created in part at least by his own misconduct.

However, in determining the care which the defendant must use towards the plaintiff in view of the known dangerous condition of the premises or plant in cases where the plaintiff has voluntarily assumed the known risk, and of the care which the plaintiff must take to protect himself where the danger though known is held to be voluntarily assumed, it is essential that the care required be such as can reasonably be required, not merely in view of the dangers known to exist, but also of

the proper operation of the defendant's business or the efficient performance of the work on which the plaintiff is engaged. The standard of care must not be unreasonably high. It is not to be forgotten that it is quite possible to nullify either the common law exemption from liability attendant upon voluntary assumption of risk, or a statutory protection placed around those whose necessities force them to encounter, *nolens volens*, well-recognized dangers, by requiring that while, on the one hand, the defendant is relieved of the duty to remove the danger, he must bear the burden of preventing it from ripening into injury by taking precautions which, though theoretically possible, would in practice be incompatible with the use of his premises or plant, or, on the other hand, by requiring that while the plaintiff does not assume the risk, he must bear a similar burden of precaution, impossible if his duties are to be promptly and efficiently discharged. It is practically impossible to conceive of a danger not so imminently dangerous "that no sensible man would encounter it," which cannot be avoided by the exercise of some conceivable precaution on the part of the plaintiff, a workman who in the course of his duty is called upon to deal with the defective tool or appliance, or to come to the place where the dangerous condition exists. Where the legislature has intended to protect such workmen from their own inability to resist the pressure of their economic necessity by providing that certain precautions shall be taken for their safety, which through their inferiority they are unable to insist upon for themselves, to hold, that unless they take such impossible precautions as this, they are to be regarded as guilty of contributory negligence and so barred from recovery, would destroy the protection in that most usual and important class of cases where the workman is injured while himself using the defective tool or appliance, or by coming to the place where the defective condition exists. The protection of such statutes would extend no further than to that small class of cases where the plaintiff's association with the defective conditions is remote; where he is not called on to use the instrument himself, and where the only danger that threatens him is that he may be injured by some fellow servant's use of it. Recovery would only be possible when the injury was received by the use or merely negligent misuse of a known defective tool, not by himself, but by some one with whom he was associated. Where statutes passed by a legislative body whose enactments are to be supreme, are to be construed and applied in jurisdiction where

the prevalent economic attitude may be radically opposed to that which prompted the passing of the act, as in the case of federal statutes which are to be enforced and applied by the courts of the various states, it is essential, in order that the statutes may not be judicially nullified, that the courts of the supreme jurisdiction shall freely and fearlessly exercise their appellate powers.

Even in the absence of that line of decision which has distinguished between contributory negligence and assumption of risk, the points of difference between the two are so many and obvious that the distinctive character of each is plainly apparent. Yet it by no means follows that because the one is not a mere variation or product of the other, they are not both based upon the same fundamental conception of the proper function of private remedial law.

Consent also differs from voluntary assumption of risk. It is manifestly improper and inaccurate to speak of assumption of risk as an implied consent to receive the harm sustained. One can be properly said to consent to a harm only when he knows that the harm will ensue and intends to suffer it. One voluntarily assuming a risk in practically every case hopes and expects to escape injury. If the maxim *volenti non fit injuria* is to express with any approach to accuracy the principle of voluntary assumption of risk, *volens* must be taken to mean willing to run the risk, not to endure the harm.

Yet undoubtedly both of these principles had their root in the same legal conception, the same individualistic view as to the proper province of private law. Where no public interest is at stake, no public harm done or threatened, each individual was and is left free to do what he pleases with his own. The state has no interest in his getting the utmost benefit from his merely private rights. It protects him in his right to do what he pleases with them—so it prohibits their invasion without his consent—it does not attempt to protect him from his own folly in dealing with them. It does not prohibit him from dissipating his resources in any way he pleases, from throwing them away, from destroying them himself, or from consenting to their destruction or impairment by others. Such is the underlying basis of consent.

The same conception logically leads to the somewhat different but cognate principle that as he may give away his private rights, as he may consent to their destruction, so, while risks may not be forced upon him against his will, he may place

them in what peril he please, subject them to what risk he chooses, and he who gives him the opportunity to do so is no more guilty of a wrong toward him than he who, with the consent of the owner, takes his property.

This, however, does not account for the defense of contributory negligence. So far there has been a conscious, freely willed destruction or imperilment of a right with which the owner is free to do what he pleases. Contributory negligence goes much further. It throws on the individual the primary burden of protecting his own interest. The courts are the last resort of him who not merely does not, but cannot, protect himself. This conception is part of the very atmosphere of English legal thought,—it is not peculiar in the law of torts to negligence alone, nor is it even confined to the law of torts. The peculiarly common law rule of *caveat emptor* is based upon it. The first distinct statement that "when common prudence and caution of man are sufficient to guard him the law will not protect him in his negligence," is by Lord Kenyon in *Pasley v. Freeman* (1), an action of deceit. Nor is this to be wondered at. The civil law conception that an individual may do what he pleases with his own is tinged by the peculiarly English characteristics of independence and self reliance, and so becomes supplemented in the common law by the more intensely individualistic conception that he is also his own first bulwark against outside interference, and that the function of remedial law takes on where the power of self protection ceases. The civil law appears to go no further than to recognize that the plaintiff is barred from recovery, when at common law he would be held to have assumed the risk, all beyond this appears to be a peculiarly common law growth.

The development in the law of negligence of this idea was necessitated by the enormous growth of protective duties incident upon the extraordinary economic and mechanical changes taking place during the early part of the nineteenth century. A civilization in which the relations between individuals were few and simple, in the course of a few years, was turned into one in which individuals were thrown into a multitude of complex and novel associations. The extent of the social duties of one citizen to another became enormously enlarged. Unless each man was to be regarded as his brother's keeper, unless he was to be unduly burdened with the duty of practically insuring the

(1) (1789) 3 T. R. 51; 1 R. R. 634.

world against the results of his conduct, it was necessary that the correlative duty of self-protection should be extended as a counterpoise and corrective. It was manifestly unfair that the whole burden of protective caution should be thrown on one of the two parties, or that any man should be required to take better care for others than such persons are bound to take of themselves. The duty of care for others manifestly should be no higher than the duty of self-protection. To hold otherwise would be to unduly burden business and enterprise, to make of those engaged therein the guardians of those apt to be affected by their operation, and at the same time to rob of self-reliance, and so enervate and emasculate and in effect pauperize the latter by accustoming them to look to others for protection and by removing from them all responsibility for their own safety. To hold that, where the only wrong alleged is the defendant's failure to take care for the plaintiff's safety, the plaintiff's own failure to protect himself debars him from recovery, is but a logical and legitimate extension of the conception underlying consent and voluntary assumption of risk—that the plaintiff can ask from others no higher respect for his rights than he himself pays to them.

If the defendant's wrong be intentional, only consent, express or necessarily implied from the circumstances, will bar recovery. The defendant's intent to cause the harm must be met by the plaintiff's intent to suffer it. If it be an act deliberately done tending to the plaintiff's manifest injury, he must as deliberately subject himself to it. If it be a mere inadvertence, a similar inadvertence will bar his recovery. Logically, therefore, the defense of contributory negligence should apply only when the gist of the alleged wrong is the defendant's failure to take care for the plaintiff's safety. So the unanimous current of decision is that when the defendant's wrong is something more than mere negligence—when it involves an intent to cause harm—contributory negligence is no defense.

When all is said, it may well be that in such case, the defendant, in the language of the Year Books, "is to be punished for his wrong,"—a wrong, in fact, quasi-criminal, not a mere breach of social duty. While the compensatory feature of the law of tort is that most prominent in modern cases, while it is often asserted that the early punitive aspect has entirely disappeared, there is much that can only be explained by a survival of the earlier conception that private compensation was given as an

incident to, or a means for, the punishment of the public wrong. This conception, while it has perhaps survived where it first existed, has rarely been extended. The modern tort recognizing and enforcing social duties is in all its features purely compensatory. The question is not merely whether the defendant ought to pay, but whether the plaintiff ought to receive damages. While the intentional wrong doer may well be punishable, even though his victim has by his own inadvertence rendered his harm possible or even probable, where the right to recover is based on the idea that one should make good the harm caused by his social delinquencies, and where, as in all cases of contributory negligence, the defendant's delinquency would have caused no harm to the plaintiff save for his own misconduct in not caring for himself, there is no reason that the law should regard one as the delinquent rather than the other. There is no reason to throw upon the one rather than the other the burden of preventing an accident actually preventable by proper care on the part of either, or of answering for the ensuing harm. It is for this reason, and because the law will not aid a plaintiff who having the power and consequent duty to protect himself has failed to do so, and not, as has been seen, because the defendant's act has by reason of the plaintiff's contributing fault ceased to be a legally proximate cause of the harm suffered, that the defendant is relieved from liability by the plaintiff's contributory negligence.

But it is only where there is equal ability, equal opportunity to avert the harm, that this applies. The law requires impossibilities of no man. When the plaintiff is for any reason impotent to protect himself, the defendant is bound, if he himself be able by care to avoid harming him, to do so; and since the defense of contributory negligence is not punitive in its origin, since the plaintiff is not to be punished for his misconduct by being put outside the protection of the law and made a species of outlaw, a *caput lupis*, it cannot matter that this impotence is due to his own antecedent misconduct.

The decided cases recognize, though they do not expressly formulate, a difference between precaution and caution,—taking care in advance to provide against merely probable dangers, and careful action in the face of known peril to oneself or others.

If the defendant's only fault is an absence of precaution, a like default on the plaintiff's part will debar the latter. If the injury results from a lack of care on both sides, both knowing of the danger and either being able to avert it if he act properly, the

plaintiff is equally barred, but a mere failure of antecedent precaution to avoid the danger does not offset a lack of caution when the danger is known. Many of the decisions unnecessarily confuse the subject by treating such lack of care in the face of manifest peril as wanton misconduct equivalent to that intentional wrongdoing to which, as has been seen, contributory negligence is no defense. Wantonness, however, involves a *mens rea*, a conscious mental attitude of complete indifference to the safety of others, differing ethically, but little from a deliberate intent to injure, but entirely distinct from mere carelessness or incompetence, no matter how great. The knowledge of the peril may emphasize the necessity for careful or skilful action, but it cannot of itself make its omission wanton.

But while the term wanton negligence, equivalent to intentional wrong, is frequently used, it will be found that in few if any of these cases is there any element of conscious recklessness or indifference to the safety of others. The plaintiff's alleged contributory negligence will be found to consist of some antecedent lack of precaution whereby he is exposed to a peril which he is himself powerless to avert. And the defendant's so called wanton negligence will be found to be a failure in caution for the plaintiff's safety, his peril being perceived. It is only where the defendant's act was antecedent to his discovery of the plaintiff's danger that actual wantonness, conscious indifference to the safety of others, has been insisted upon as an element necessary to the recovery by a plaintiff himself negligent at a latter stage in the transaction, whether his negligence has been a lack of precaution or caution.

To sum up, it would appear that the defense of contributory negligence is not a mere application to the particular facts upon which it arises of the rules governing proximity of causation, or of the right of indemnity or contribution between wrong doers, or the voluntary assumption of a known risk, but is itself a distinct and separate exhibition of the individualism of the common law, which exhibits itself in other fields in the doctrines of consent and voluntary assumption of risk. It debars from recovery, even from an admittedly negligent defendant, one whose own social misconduct has been a concurring proximate cause of his harm. In many jurisdictions there has persisted in this one particular connection, that conception of legal as distinguished from actual cause which prevailed when the earliest cases on contributory negligence were decided, and which has

become obsolete in other fields, which regarded the last actor, him whose conduct supplied the final impulse, as the sole responsible cause, and this whether the plaintiff's peril was actually known to the defendant or could have been discovered had he exercised normal care. Nor is it strange that in this one particular class of case this archaic idea continues. The very tendency toward a fuller and more complete measure of responsibility on the part of those guilty of social misconduct which led to the repudiation of the rule in *Vicars v. Wilcocks* (1) where it restricted liability, naturally tended to retain it where its abandonment would have restricted rather than enlarged the liability of a negligent defendant. Then, too, it was difficult in practice to distinguish between the failure to take care where the plaintiff's danger and his inability to help himself was known to the defendant, and the case where the defendant, had he been on the alert, as he should have been, could have discovered it. Since, admittedly, the defendant was liable in the one case, it was hard to deny the plaintiff relief in the other. And it is submitted that the doctrine of last clear chance goes no further than this. Where the defendant, had he discovered the plaintiff's peril, would be powerless to avert it, even though his inability to save the plaintiff is due to some prior misconduct whereby he has put it out of his power to do so, he is generally held not to be liable for the ensuing harm, nor will it matter which of the two antecedent misconducts, the plaintiff's or the defendant's was the last in point of time if neither, after the danger is or should be discovered, is capable of averting it.

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University of Pennsylvania.

(1) (1806) 8 East. 1.

CASES AND COMMENTS.

Will—Construction—Child—En ventre sa mere.

In this case the question arose as to the rights of a child who was not born in the testator's lifetime but was at the time *en ventre sa mere*. If he was taken to have been born in the lifetime of the testator he would have been entitled to an estate for life; if he was taken to have been born after the death of the testator he would be entitled to an estate tail. Swinfen Eady J. took the latter view; his judgment was upset by the Court of appeal which ruled that there is a fixed principle of construction which compels a Court to hold that a child is born in the lifetime of the deceased testator if at that time he was *en ventre sa mere*. Upon appeal to the House of Lords this view was negatived. Lord Loreburn L. C. and Lord Atkinson pointed out that there was no fixed rule of construction as laid down by the Court of appeal, but that the legal fiction in question was to be applied only for the benefit and not for the detriment of the child. The child is assumed to be potentially in existence and included in the motive of the gift only when such a construction is for his benefit. A similar rule has been laid down in some of the American Courts [1 Wharton 213], though the contrary view has also been maintained [14 Georgia 232]. A question of some nicety may however arise, if the applicability of the Rule against perpetuities is to be faced; in such a case there does seem to be an established rule, that the subsequently born child must be treated as alive at the death of the testator, though it may be in the interest of the child to contend that the gift is void as an infringement against the rule. *In re Wilmer*, (1903) 2 ch. 421.

Villar

v.

Gilbey.

[1907.]

A. C. 139.

Libel and slander—Privilege—Publication.

This case lays down two important propositions of law on the subject of libel. It rules in the first place that where a limited company sends a communication containing defamatory statements of a third person to another Company to which it owes the duty of making the communication and which has an interest in receiving the communication, the occasion is privileged, notwithstanding the fact that the duty is one of imperfect obligation only. In the second place it is pointed out that where the managing director of the company dictates to a stenographer

Edmondson

v.

Birch.

[1907.]

1 K. B. 371.

the defamatory letter which is subsequently sent to the other company, the privilege in question covers the publication to the stenographer. This latter proposition eats into the rule laid down in *Pullman v. Hill* (1891) 1 Q. B. 524, the effect of which had already been greatly limited by *Boxsius v. Goblet* (1894) 1 Q. B. 842. Reference may also be made to our note on *Puterbaugh v. Gold Medal* 4 C. L. J. 43n.

Rex
v.
De Marny.
[1907.]

1 K. B. 388.

Newspaper—Obscenity—Advertisement.

In this case a question arose as to the liability of an editor of a newspaper, in which advertisements are published which are in themselves not obscene but relate to books and photographs which are obscene to the knowledge of the editor. Lord Alverstone C. J. held that the editor was liable to conviction on a charge of causing and procuring obscene books and photographs to be sold and published and to be sent by mail. This is obviously good sense. The publication is directly brought about by the act of the accused who had knowledge that such would be the consequence of the insertion of the advertisements in his paper. In other words, the person who receives money for the advertisements becomes liable in the same way as the person who himself sells indecent literature. Similar view has been taken by the United States Supreme Court, (*Grimm v. United States*, 156 United States 604). The American Courts in fact have gone further and have ruled that if one partner acts in such a way with the knowledge and acquiescence of the other, both become liable. (*Burton v. United States* 142 Fed. Rep. 57).

Thorby
v.
Orchis Steam-
ship Co.,
[1907.]

1 K. B. 660.

Steamship—Deviation from course—Limitation of liability—Contract of affreightment.

This case affirms the rule that in marine transportation, any unauthorized deviation of the vessel from her legitimate and contemplated course, nullifies exemption from liability contained in the bill of lading or other contract under which the cargo is shipped; such deviation renders the carrier liable as an insurer for any loss occasioned by or taking place during the deviation. This rule may be defended upon a two fold ground, *first*, because the deviation amounts to an abandonment by the ship of the

original contract and all its terms, relegating the carrier to its common law liability; *secondly*, because by the deviation any insurance on the cargo is lost, the carrier, through whose act the shipper is deprived of the protection afforded by this security, should be held to have assumed that protection. This principle has been adopted not only in England, [6 Bingham 716; (1897) Page 133,] but also by the Supreme Court of the United States 21 Howard 7; 154 U. S. 51.]

Seamen—Right to Wages—Refusal to proceed.

In this case a question arose as to the right of a seaman under contract of service for ordinary voyage, to refuse to proceed to belligerent port without relinquishing the right to wages. The general rule on the subject is that seamen must complete the voyage for which they have signed articles, in order that they may be entitled to claim the stipulated wages; and if they refuse to continue the voyage without adequate cause, they forfeit the whole amount of wages due. Certain circumstances, however, may operate to release the seamen from their obligations and entitle them to refuse to continue the voyage without incurring a forfeiture of their wages. Thus a deviation from the voyage specified in the shipping articles, may justify a refusal to continue the voyage, on the ground that the seamen cannot be held to service essentially different from that which they contracted to render. The case under notice holds that this right of seamen exists when the master of a vessel proposes to proceed with a cargo of contraband of war to the port of a country engaged in hostilities, although the proposed port is within the limits of the voyage contemplated and the seamen knew at the time when they signed articles, that a state of war existed. This view is supported by the decisions in 93 L. T. N. S. 174 and 94 L. T. N. S. 198. The principle is that there is a substantial increase of risk and the knowledge of the increase of the risk and danger comes to the crew in the course of the voyage. Similar view has been taken in the American Courts [*Campbell v. Steamer Uncle Son*, 4 Fed. Cas. No. 2372].

Caine
v
Palace Steam-
ship Co.,
[1907]
1 K. B. 670.

Meigs

v.

Tunncliffe.

214 Penn 495.

Mortgage—Release by Mortgagee.

In this case the question arose as to the effect of a release by a mortgagee of a portion of the mortgaged premises to a grantee of the mortgagor on the personal liability of the mortgagor. It was held that where mortgaged premises are conveyed by the mortgagor to a third person, and the mortgagee without the consent of the mortgagor releases part of the property so conveyed from his mortgage lien, and it turns out in the end that the portion not released is not sufficient to satisfy the mortgage debt, the mortgagee is not entitled to proceed personally against the mortgagor for the balance. This view is supported by the decision of the Master of the Rolls in *Palmer v. Hendrie*, 27 Bevan 349, 28 Bevan 341. Reference may also be made to L. R. I. P. C. 50, L. R. 7 Q. B. 756, 1 Q. B. D. 669. It may be observed however that this view is not quite equitable. Of course the liability of the mortgagor cannot be increased by any action on the part the mortgagee; at the same time, full justice would be done if the value of the property released is taken into account in determining the burden to be thrown upon the mortgagor. This position is supported by the case of *Worcester v. Thayer*, 136 Mass. 459. It was pointed out in this case that if there are several parcels of land included in one mortgage, the mortgagor cannot complain if the mortgagee releases one or more of them and is satisfied to rest upon the diminished security, provided no additional burden is thrown upon the mortgagor. But it is not easy to see why the mortgagor should have any just ground for complaint beyond the extent to which he has been injured. If therefore after taking the true value of the released property into account, a personal liability still remains upon the mortgagor, there is no reason why he should escape liability to that extent.

Foster

v.

Harlan.

71 Kansas

158.

Equitable Mortgage.

In this case a question arose as to how an equitable mortgage may be created. A agreed with B that if B should lend him a sum of money, he would apply it for the purchase of a specified tract of land and as soon as his own title was completed, he would execute a mortgage in favour of B for the sum advanced. A obtained the money and bought the land and subsequently

refused to execute the mortgage, and before B could enforce his rights, A transferred the land to C, who took with notice of the agreement. It was successfully contended by B as against C that B had an equitable mortgage on the property. The Supreme Court held that as equity would regard that as done which the borrower agreed should be done and which ought to have been done the Court would treat the transaction as creating an equitable mortgage upon the land in favour of the lender.

REVIEWS.

Solicitors' Forms—VOL. II—by CHARLES JONES—EFFINGHAM WILSON, LONDON, 1908—5s. nett.—Mr. Jones published eleven years ago the first volume of a book of practical forms which went into a second edition in 1903. The present volume is intended to complete the work. It is on the same lines as its predecessor and it provides in addition to general conveyancing forms, precedents which are not met with in standard works. The value of the work is enhanced by the insertion of more than one form in many cases and the utility of the book is considerably increased by valuable notes of which a good specimen will be found in page 88. The index is very comprehensive and we trust that the book will meet with the same favour as the first volume.

A Triennial Key to the Current Index of INDIAN CASES 1905-1907—by T. V. SANJIVA ROW, TRICHINOPOLY, 1908—Mr. Sanjiva Row's Current Index which is familiar to the profession all over India has gone into a third volume. The busy practitioner therefore who has to look up for a recent case upon any point must undergo the trouble of looking through all these volumes. To avoid this Mr. Row very considerably furnishes a Key or Index which is indispensable to all who use the Current Index. We have tested the work in places and found it invariably accurate.

CIVIL.

1908.

Ira Nath Roy
vs. DwadhuryIra Kumari
vs. Dwadhury,
and
Brij Behari
SahaiIra Kumari
vs. Dwadhury

Ira, C. J.

by him after he had left the judicial post which he was occupying when he heard the case.

The result is that the appeal is sent back to the Division Bench which made the reference with this intimation of our opinion.

The appellant must pay the costs of this reference—hearing fee three hundred rupees.

Rampini J.—I do not wish to press the view I expressed in the reference : and I agree with the learned Chief Justice.

Brett J.—I agree with the learned Chief Justice.

Mitra J.—I agree with the learned Chief Justice. Babu Dwarka Nath Chakravarti in the course of his argument referred to two cases (Appeals from Appellate Decrees Nos. 2264 and 2239 of 1905) decided by me in the beginning of the year 1905. The facts of those cases are clearly distinguishable from those of the present case, and it appears to me that the question which has now been argued was not argued then before me.

Doss J.—I agree in the judgment of the learned Chief Justice.

A. T. M.

Case sent back.

INDEX OF CASES.

Vol. VII.

Abandonment—*Bengal Tenancy Act (VIII of 1885), Sec. 87, not exhaustive—Abandonment, a question of intention—Mortgage of non-transferable holding—Mortgagee auction-purchaser—Mortgagor, interest of—Ejectment of purchaser by landlord—Re-entry—Execution sale—Voluntary abandonment.*

The first sub-section of section 87 of the Bengal Tenancy Act shows that abandonment is the effect of the act of the tenant in vacating the holding without making arrangement for payment of his rent as it falls due, and for cultivating the land.

Whether there is abandonment or not in any individual case is a question of intention to be determined upon the facts of the particular case.

In order to effect a legal abandonment and to allow a valid re-entry by the landlord, service of notice under sub-section 2 of section 87 of the Bengal Tenancy Act is not necessary. The only effect of the service of notice is to make it obligatory upon the tenant to have a speedy determination of the question whether there has been an abandonment or not.

Section 87 of the Bengal Tenancy Act is not exhaustive and a landlord is not a wrong-doer merely because he re-enters upon the holding before he has followed the procedure laid down in that section.

When the holding is a non-transferable one, and the ryot executes a mortgage, the mortgage is inoperative as against the landlord, but as between mortgagor and mortgagee, the mortgage is operative.

Where the mortgagee of a non-transferable occupancy holding purchases the holding in execution of his mortgage decree and takes possession, the possession of the tenant mortgagor completely ceases, and the holding passes into the occupation of the mortgagee. As against the landlord, the mortgagee auction-purchaser is a trespasser. The landlord is entitled to sue him and to obtain a decree for ejectment; in such a suit the tenant who is not in occupation is not a necessary party.

Under the circumstances of the case, the abandonment of his holding by the tenant, although due to the execution sale, is a voluntary one. **Ram**

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Abwabs—*Batta usual, Dustur, Hazzatnama, Sonari, Salami, Percentage and Batta Company.*

The *Batta usual, Dustur, Hazzatnama, Sonari, Chanda, Salami* and *percentage* are abwabs.

